68

(1) Supreme Court, U.S.
FILED

07-452 OCT 01 2007

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JOE LEONARD LAMBRIGHT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

TERRY GODDARD
Attorney General

MARY O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

PATRICIA NIGRO
Assistant Attorney General
(Counsel of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542–4686

CAPITAL CASE

QUESTIONS PRESENTED

In 2001, the Ninth Circuit ordered an evidentiary hearing to address Lambright's claim of ineffective assistance of counsel at sentencing, noting in particular allegations that counsel failed to pursue evidence that Lambright suffered from post-traumatic stress disorder based on combat experiences in Vietnam, as well as other evidence Lambright asserted would have changed the sentencing decision. After conducting a 6-day evidentiary hearing, the district court denied Lambright's claim, finding that his alleged combat experiences were fabricated, and that his other factual assertions were not proven or related to evidence that was presented at the time of sentencing. The Ninth Circuit reversed, finding that the district court improperly considered the "causal nexus" between the proffered mitigation and the crime in weighing the value of the purported mitigation and determining whether it would have changed the outcome of Lambright's sentencing proceeding.

1. Did the Ninth Circuit err when it held that *Tennard v. Dretke*, 542 U.S. 274 (2004), requires not merely that mitigating evidence with no causal connection to the crime be *considered* at a capital sentencing hearing, but also that a court may not take the absence of a causal connection into account when assessing whether the failure of counsel to present that evidence was prejudicial?

2. Did the Ninth Circuit err by failing to give proper deference to the district court's factual findings and credibility assessments regarding Lambright's proffered mitigation and regarding the persuasiveness of Lambright's argument that the proffered mitigation would have changed the outcome of the sentencing proceeding?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i
TABLE OF AUTHORITIES iii
OPINION BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL PROVISIONS 1
STATEMENT OF THE CASE 3
REASONS WHY THE WRIT SHOULD BE GRANTED 9
CONCLUSION 29
CERTIFICATE OF COMPLIANCE 30
APPENDIX A A-1
APPENDIX B B-1
APPENDIX C C-1
APPENDIX D D-1

TABLE OF AUTHORITIES

Cases

Anderson v. City of Bessemer City, North Carolina,
470 U.S. 564 (1985) 16
Correll v. Ryan, 465 F.3d 1006 (9th Cir. 2006) 26, 27, 28
Eddings v. Oklahoma, 455 U.S. 104 (1982) 9, 14
Graham v. Collins, 506 U.S. 461 (1993) 13
Kansas v. Marsh, __ U.S. __, 126 S.Ct. 2516 (2006) 13
Lambright v. Schriro, 241 F.3d 1201 (9th Cir. 2001) 5
Lambright v. Stewart (Lambright II),
191 F.3d 1181 (9th Cir. 1999) 1
Lambright v. Stewart (Lambright III),
241 F.3d 1201 (9th Cir. 2001) 4
Lambright v. Stewart (Lambright V),
490 F.3d 1103 (9th Cir. 2007) 1
Landrigan v. Schriro, 127 S.Ct. 1933 (2007) 26
Lockett v. Ohio, 438 U.S. 586, 608 (1978) 12
Lockhart v. Fretwell, 506 U.S. 364 (1993) 10
McKoy v. North Carolina, 494 U.S. 433 (1990) 13
Raley v. Ylst, 470 F.3d 792 (9th Cir. 2006). 16
Schriro v. Smith, 546 U.S. 6 (2005). 4
Smith v. Texas, 543 U.S. ___ (200_) 12
State v. Brewer, 170 Ariz. 486, 826 P.2d 785 (1992) 25
State v. Gerlaugh, 144 Ariz. 449, 698 P.2d 694 (1985) 25
State v. Harrod, 26 P.3d 492 (Ariz. 2001) 15
State v. Hoskins, 14 P.3d 997 (Ariz. 2000) 14
State v. Jones, 197 Ariz. 290, 4 P.3d 345 (2000) 25
State v. Lambright (Lambright I), 138 Ariz. 63,
673 P.2d 1, 4 (1983) 4
State v. Newell, 212 Ariz. 389, 132 P.3d 833 (2006) 9
State v. Pandeli, 215 Ariz.514, 161 P.3d 557 (2007) 9, 15
State v. Sansing, 77 P.3d 30 (Ariz. 2003) 15
Stewart v. Smith, 536 U.S. 982 (2002) 4
State v.Wallace, 160 Ariz. 424, 773 P.2d 983 (1989) 25

Strickland v. Washington, 466 U.S. 668 (1984) ..... passim
Teague v. Lane, 489 U.S. 288 (1989) 14
Tennard v. Dretke, 542 U.S. 274 (2004) ..... passim

Statutes

18 U.S.C. § 2254(d)(1) 16
28 U.S.C. 1257(a) 1

Constitutional Provisions

U.S. Const. art. III, 2 6
U.S. Const., amend. VI 1
U.S. Const., amend. VIII 2, 12, 14
U.S. Const., amend. XIV 2

RULES

FED. R. CIV. P. 52(a) 19

OPINION BELOW

A panel of the United States Court of Appeals for the Ninth Circuit (Judges Reinhardt, Ferguson, and Thompson) held in a per curiam decision that Lambright is entitled to be resentenced based on trial counsel's alleged deficient performance and resulting prejudice. *Lambright v. Stewart* (*Lambright V*), 490 F.3d 1103, 1115 (9th Cir. 2007) (Pet. App. A, at 4.) The panel opinion reversed a decision by the United States District Court for the District of Arizona. *Lambright v. Lewis* (*Lambright IV*), No. CV-87-235-TUC-JMR (Pet. App. B). See also *Lambright v. Stewart* (*Lambright III*), 241 F.3d 1201 (9th Cir. 2001); *Lambright v. Stewart* (*Lambright II*), 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc); *State v. Lambright* (*Lambright I*), 138 Ariz. 63, 673 P.2d 1 (1983).

STATEMENT OF JURISDICTION

The Ninth Circuit denied Petitioner's request for rehearing en banc on July 2, 2007. (Pet. App. A, at 1-2.) This petition for writ of certiorari is timely filed within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

Joe Leonard Lambright and his accomplices, Robert Smith and Kathy Foreman, murdered Sandy Owen in March 1980. The facts underlying the murder are set forth in *Lambright v. Stewart* (*Lambright III*), 191 F.3d 1181, 1182-83 (9th Cir. 1999) (en banc):

> Lambright and Smith were traveling across the country with Lambright's girlfriend, Kathy Foreman. Smith was troubled by the fact that while Lambright and Foreman had intercourse in his presence, he did not have anybody along to satisfy him. For his part, Lambright thought that he "would like to kill somebody just to see if he could do it." They decided that both desires could be fulfilled, and they set out with Foreman to find a victim. They found Sandy Owen and kidnapped her. Smith raped her on the way to a mountain site where they all got out of the car and Smith raped Owen again as Lambright and Foreman had intercourse. What happened next was that Smith began choking Owen, and Lambright declared that she must be killed. So, "Lambright took Foreman's knife out of its sheath and began stabbing the victim in the chest and abdomen, twisting the knife around inside of her. Smith held one of the victim's arms while she was being stabbed, and Foreman held the other arm." After that, "Smith unsuccessfully tried to break Ms. Owen's neck by twisting her head. Then Lambright, Foreman or both began cutting deeply into the victim's neck with the knife. . . . The victim remained alive, and was at least semiconscious, as she attempted to raise herself up

> on one arm. Lambright picked up a large rock and hurled it at her head. Foreman testified that as he threw the rock [Lambright] yelled 'Die, bitch.'" The three then drove off in a celebratory mood, playing the piece "We Are the Champions" as they went. Once caught, the trio's song changed. Foreman turned state's evidence, was given immunity, and testified against her erstwhile lover and his friend. Lambright confessed, but deemed Smith to be the worst of the three. Smith, too, confessed, but he dubbed Foreman and Lambright as the real killers.

(Citations omitted). *See also State v. Lambright* (*Lambright I*), 673 P.2d 1, 4-5 (Ariz. 1983) (noting additional details). Following a jury trial, Lambright was convicted of first-degree murder, and he was sentenced to death by Pima County Superior Court Judge Michael Brown.[1] *Id.* at 4.

After the Arizona Supreme Court rejected Lambright's direct appeal and state post-conviction proceedings, the United States District Court for the District of Arizona denied Lambright's federal petition for writ of habeas corpus. In 2001, Ninth Circuit Judges Reinhardt, Ferguson and Thompson reversed the district court's ruling and ordered an evidentiary hearing on whether trial counsel was ineffective under *Strickland v. Washington*, 466 U.S.

---

[1] Co-defendant Smith was also convicted of first-degree murder and sentenced to death. His appeal from the denial of his federal petition for writ of habeas corpus remains pending in the Ninth Circuit. This Court has issued two Opinions reversing Ninth Circuit decisions in Smith's case. *Stewart v. Smith*, 536 U.S. 856 (2002); *Schriro v. Smith*, 546 U.S. 6 (2005).

668, 697 (1984),[2] in representing Lambright at sentencing. *Lambright v. Schriro*, 241 F.3d 1201 (9th Cir. 2001).

The panel based its 2001 remand decision on proffered evidence—primarily in the form of affidavits—indicating that trial counsel should have pursued claims that Lambright suffered from post-traumatic stress disorder ("PTSD") as the result of a combat experience in Vietnam in which Lambright allegedly watched his best friend die in his arms after being "cut in half" by machine gun fire, and that Lambright had chronically abused methamphetamine. *Lambright*, 241 F.3d at 1207-08. The panel further suggested possible deficient performance based on trial counsel's alleged failure to interview Lambright's sister and to seek a second psychiatric evaluation.[3] *Id.* at 1206-07.

Following extensive discovery and evidentiary development, the district court conducted a hearing in November 2003. Over the course of the hearing, Lambright's traumatic wartime experiences were revealed to be blatant lies. In reality, Lambright's military service in Vietnam consisted of time as a mechanic and never involved combat action. (Pet. App. B, at 14, 20, 22-23.) Furthermore, the friend Lambright claimed to have held dying in his arms was still alive and well. (*Id.* at 21-24.)

The district court issued a detailed 31-page order addressing the issues the Ninth Circuit had identified as potential deficiencies in trial counsel's performance. The

---

[2] Under *Strickland*, a defendant who challenges his counsel's effectiveness at sentencing must demonstrate (1) deficient performance on the part of counsel, *and* (2) resulting prejudice, that is, a reasonable probability that absent counsel's errors, the sentencer would have imposed a different sentence. 466 U.S. at 687.

[3] A court-appointed mental health expert diagnosed Lambright prior to sentencing as having an anti-social personality disorder.

district court noted that Lambright's federal habeas counsel had thoroughly developed Lambright's claims relating to PTSD and drug abuse, but that such claims did not survive scrutiny because they were based on falsehoods. (Pet. App. B, at 39.) The district court found that trial counsel, who was experienced both as a prosecutor and a defense attorney for a number of years prior to representing Lambright, had prepared thoroughly for trial and sentencing, with his preparation including extensive interviews of Lambright's sister and friends, and that counsel's performance was not deficient. (*Id.* at 29-30, 37-38.)

Addressing the prejudice prong of the *Strickland* analysis, the district court found that any alleged deficiencies in trial counsel's performance did not prejudice Lambright, primarily because he did not prove the factual predicates of his claims of PTSD and drug impairment at the time of the crime, or the existence of other alleged mitigating evidence of which the trial judge was not already aware. The district court thus concluded that, even assuming deficient performance, Lambright had not established resulting prejudice:

> Having read all of the trial and sentencing transcripts, listened to all of the testimony at the evidentiary hearing, and reviewed all relevant exhibits, the Court finds that Petitioner's claims regarding PTSD and methamphetamine use contributing to his conduct at the time of the brutal kidnapping, rape and murder of a vulnerable victim are not supported by the evidence. Although only one aggravating factor was established in this case, it was a significant one. The case against Petitioner, which included Petitioner's confession, testimony of an eyewitness, and Petitioner's

possession of the victim's jewelry, against the backdrop of an entirely merciless and shocking abduction, rape and murder, was unshakable, the many hours of investigation and retrospect devoted to Petitioner's case by two very able habeas attorneys, a mitigation specialist and a psychiatrist notwithstanding.

Mitigation evidence plays a significant role in the penalty phase of a capital case and is even more critical in Arizona because the presence of an aggravating factor without mitigation evidence requires the court to impose the death penalty. *See* A.R.S. § 13-703(E). In a case like the instant one, however, *where the avenues of potential mitigation evidence are either unsubstantiated or were already before the sentencing judge*, the Court is not persuaded that any deficiencies in counsel's representation rendered the sentencing proceeding "fundamentally unfair or unreliable." *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). . . . Because this Court finds that there is no reasonable probability of a different outcome, Petitioner is not entitled to relief on his IAC penalty phase claim.

(Pet. App. B, at 42-43) (emphasis added).

Notwithstanding the district court's careful analysis of Lambright's *Strickland* claim, the Ninth Circuit panel again reversed, this time holding that the district court violated the principles set forth in *Tennard v. Dretke*, 542 U.S. 274 (2004), by giving less weight to Lambright's proffered mitigation because he did not establish a causal nexus between the alleged mitigating evidence and the crime. The Ninth Circuit concluded that the district court's entire

analysis was "fundamentally flawed" because it "relied heavily on its finding that Lambright had not shown a nexus between his proffered mitigation and the crime." (Pet. App. A, at 24-25, 490 F.3d at 1115.)

Purporting to apply a clear error standard of review regarding the district court's factual findings, the Ninth Circuit ruled that the district court erred in concluding that (1) facts relating to Lambright's childhood were "largely identified to the sentencing judge," (2) Lambright did not establish the existence of evidence his attorney should have discovered regarding Lambright's alleged drug use, and (3) Lambright's mental health evidence, in particular testimony from an expert at the hearing, was not persuasive and did not establish significant mental health information beyond what was presented to the sentencing judge. (*Id.* at 43-46, 490 F.3d at 1123-25.)

Finally, notwithstanding evidence of significant preparation by trial counsel, including a five-day trip to Texas and Louisiana to interview Lambright's family and friends, the Ninth Circuit found that trial counsel "spent only five and a half hours obtaining evidence and preparing for the penalty phase." (Pet. App. A, at 33, 490 F.3d at 1119). The Ninth Circuit thus reversed the district court's ruling and ordered that Lambright's sentence be vacated. (Pet. App. A, at 54, 490 F.3d at 1128.)

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The Ninth Circuit's ruling misapplies this Court's Eighth Amendment jurisprudence, including *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Tennard v. Dretke*, 542 U.S. 274 (2004), and directly conflicts with decisions by the Arizona Supreme Court regarding whether the sentencer in a capital case may consider the "causal nexus" between the crime committed and proffered mitigation evidence and give diminished weight to mitigation evidence with no nexus to the crime. In *Tennard*, this Court found that Texas' former capital sentencing scheme improperly restricted defendants from *presenting* evidence to the factfinder absent a causal nexus to specific sentencing factors. 542 U.S. at 283-84. The Ninth Circuit erred by concluding that *Tennard* not only requires a state to allow presentation and consideration of proffered mitigation evidence that may not have a nexus to the crime, but that it restricts the sentencer from taking the absence of a "causal nexus" into account when assessing the value of that evidence.

In direct contrast to the Ninth Circuit's analysis, the Arizona Supreme Court has interpreted *Tennard* as requiring only that a defendant be allowed to present for *consideration* any evidence the defendant or counsel believes to be mitigating, without restricting the sentencer's discretion in assessing the weight to be given the proffered evidence. *See State v. Pandeli*, 215 Ariz. 514, ¶ 72, 161 P.3d 557 (2007) ("Although '[w]e do not require that a nexus between the mitigating factors and the crime be established before we *consider* the mitigation evidence . . . the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.'") (citing *State v. Newell*, 212 Ariz. 389, 405, ¶ 82, 132 P.3d 833, 849 (2006) (emphasis added).

In the instant case, the district court applied a "causal nexus" test in precisely the same manner that the Arizona Supreme Court has repeatedly applied that test. Thus, the Ninth Circuit's rejection of the district court's "causal nexus" analysis affects not only this case, but every other Arizona capital case in which a defendant has presented mitigation evidence that has been given de minimus weight based on the absence of a causal nexus to the crime. The Ninth Circuit's analysis erroneously interprets *Tennard*, and this Court should grant review to correct that error and to resolve the conflict between the Ninth Circuit's and the Arizona Supreme Court's interpretation of *Tennard*.

2. The Ninth Circuit failed to properly defer to specific factual findings by a district court judge who carefully considered the evidence and assessed the credibility of witnesses during a 6-day evidentiary hearing. In doing so, the Ninth Circuit directly violated this Court's mandate that a reviewing court not substitute its judgment for that of a judge who has made credibility assessments and findings following an evidentiary hearing.

3. The Ninth Circuit's ruling interferes with the State of Arizona's and crime victims' interest in the finality of state court convictions and sentences. Lambright was convicted and sentenced more than two decades ago, and his case has been pending in federal court since 1987. Notwithstanding a full-blown evidentiary hearing in which the district court thoroughly reviewed Lambright's ineffective assistance claim and rejected it in a meticulously supported opinion, Lambright's sentence has been set aside. Absent intervention by this Court to correct the Ninth Circuit's overreaching, public confidence in the judiciary will be undermined and the interests of justice will be thwarted.

I. ***The Ninth Circuit's analysis misapplies Tennard v. Dretke, and directly conflicts with rulings by the Arizona Supeme Court.***

A. *Misinterpretation of Tennard*

The crux of the Ninth Circuit's analysis of Lambright's ineffective assistance of counsel claim is based on an erroneous interpretation of *Tennard v. Dretke*:

> Here, the district court relied heavily on its finding that Lambright had not shown a nexus between his proffered mitigating evidence and the crime, flatly rejecting the majority of the mitigating evidence he offered on that basis. Indeed, it is apparent from the district court's order that it either did not consider mitigating any evidence without an explicit nexus to the crime, or that it gave such evidence de minimus weight. Because the district court's rejection of Lambright's mitigating evidence on that basis violates the rule set forth in *Tennard*, *Smith v. Texas*, and *Smith v. Stewart*, and their predecessors, we hold that its analysis of Lambright's ineffective assistance of counsel claim was fundamentally flawed.

(Pet. App. A, at 24-25, 490 F.3d at 1115.)

Preliminarily, the Ninth Circuit has mischaracterized the district court's legal conclusions and analysis. The district court did not decline to consider mitigation. Instead, the district court simply determined, for example, that proffered mitigating evidence relating to Lambright's family background did not "significantly affect"

Lambright's conduct at the time of the crime, and that Lambright's drug use unconnected to the crime was not "significantly mitigating." (Pet. App. B at 36, 39-40.) The district court did not exclude any mitigation evidence from consideration, but rather concluded that much of that evidence did not deserve significant weight.

The Ninth Circuit has misinterpreted *Tennard* and *Smith v. Texas*, 543 U.S. 37 (2004). In *Tennard*, this Court held that a state may not prevent the sentencer from considering and giving effect to relevant mitigation evidence by using a "screening test" that requires a nexus to the crime before the evidence can be considered by the sentencer. 542 U.S. at 283-84. In *Smith*, this Court similarly found unconstitutional a nullification instruction that negated jurors' ability to consider and give effect to mitigation evidence if the evidence did not directly relate to two statutorily specified issues. 543 U.S. at 47. Thus, contrary to the Ninth Circuit's analysis, *Tennard* and *Smith* stand only for the proposition that a sentencer cannot be precluded from *considering* proffered mitigation evidence. *Tennard* and *Smith* do not support an assertion that the sentencer cannot determine the weight to be afforded proffered mitigation based on its causal nexus to the crime.

The Ninth Circuit's analysis goes far beyond this Court's Eighth Amendment jurisprudence. Almost thirty years ago, this Court held that "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The Court later held that a capital sentencer must be allowed to consider all relevant mitigating evidence:

> Just as the State may not by statute preclude the sentencer from considering any

> mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. . . . The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114 (1982) (emphasis in original). *See also McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment) ("*Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.").

The Eighth Amendment thus requires only that a sentencer be able to consider and give effect to mitigating evidence proffered by a capital defendant. This Constitutional provision is satisfied unless evidence is "placed beyond the effective reach of the sentencer" and the sentencer is precluded from considering the proffered mitigation in the first instance. *Graham v. Collins*, 506 U.S. 461, 474 (1993); *see also Kansas v. Marsh*, __ U.S. __, 126 S.Ct. 2516, 2525 (2006) ("In aggregate, [this Court's] precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to *consider* that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here."). (Emphasis added.)

In the instant case, the district court considered the effect each piece of mitigating evidence offered by Lambright

would have had on the original sentencer. The district court's determination that much of the proffered mitigation would not have been particularly weighty was supported by the record and did not result in an Eighth Amendment violation.

Furthermore, if allowed to stand, the Ninth Circuit's ruling based on its interpretation of *Tennard* would be a new rule imposed on collateral review in violation of *Teague v. Lane*, 489 U.S. 288, 311 (1989). The Ninth Circuit's interpretation does not follow from this Court's jurisprudence, most notably *Eddings*, where this Court found a difficult family background to be "particularly mitigating" because the defendant was only 16 years of age at the time of the crime. 455 U.S. at 115. If evidence can be "particularly mitigating" in that type of situation, it stands to reason that in other situations the evidence may not be particularly mitigating, as the district court found here. This Court should grant certiorari review to correct the Ninth Circuit's erroneous and *Teague*-barred interpretation of this Court's Eighth Amendment jurisprudence in the context of a *Strickland* claim on collateral review.

B. Conflict with Arizona Law

The district court's causal nexus analysis is virtually identical to the analysis that has been applied by Arizona courts in every capital case in which mitigation is proffered. The Arizona Supreme Court has made clear, both prior to and after the *Tennard* decision, that the sentencer in a capital case should not be prohibited from *considering* any proffered mitigation, but that the absence of a causal nexus to the crime may be considered in assessing the weight or significance to be afforded the proffered evidence. In *State v. Hoskins*, 199 Ariz. 127, 152, ¶ 113, 14 P.3d 997, 1022 (2000), the court stated:

> The "nexus" or "causal link" requirement in these cases has purpose. Where we determine questions of aggravation and mitigation in the sentencing process, the significant point in time for causation is the moment at which the criminal acts are committed. If the defendant's personality disorder or dysfunctional family background leads reasonable experts to conclude that the disorder in fact caused the crime, significant mitigation is established. But here, the evidence runs counter to that very proposition. The murder was not consistent with the proffered symptoms of personality disorder or family background because it was not an impulsive act, nor was it based on lapse of judgment.

See Pandeli, 215 Ariz. at 532, ¶ 72, 161 P.3d at 575; *see also State v. Sansing*, 206 Ariz. 232, 239, ¶¶ 26-28, 77 P.3d 30, 37 (2003) (absent expert testimony linking cocaine use to defendant's capacity to control his conduct or his capacity to appreciate the wrongfulness of his actions at the time of the murder, defendant did not establish statutory mitigating circumstance or weighty non-statutory mitigation). *State v. Harrod*, 200 Ariz. 309, 320, ¶ 54, 26 P.3d 492, 502 (2001) ("The [sentencing] court found that the absence of Harrod's biological father was not a mitigating factor because there was no evidence that his absence had any causal relationship to Harrod's participation in the murder. We agree.").

The Ninth Circuit's *Tennard* analysis directly conflicts with that of the Arizona Supreme Court. Left unchanged, that analysis will affect every Arizona case in which courts or jurors have considered, but given diminished weight to, proffered mitigation for which a causal nexus has not been established. Although this case is not governed by the Anti-Terrorism and Effective Death

Penalty Act of 1996 ("AEDPA),[4] the Ninth Circuit's analysis will apply not only to pre-AEDPA cases, but to any case involving an interpretation of *Tennard*. Left unchanged, the Ninth Circuit's interpretation will become the benchmark by which federal courts must determine whether a state court decision involved an unreasonable application of *Tennard*. *See* 18 U.S.C. § 2254(d)(1) (federal habeas petitions governed by the AEDPA will only be granted if the state court adjudication of a claim involved an "unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States"). Given the broad applicability of the Ninth Circuit's decision and its clear conflict with Arizona law as set forth by the Arizona Supreme Court, review by this Court is imperative.

II. *The Ninth Circuit erred by finding that the district court's factual findings were "clearly erroneous."*

Although legal issues raised in a petition for writ of habeas corpus are subject to *de novo* review by an appellate court, *Raley v. Ylst*, 470 F.3d 792, 799 (9th Cir. 2006), factual findings are entitled to significant deference and should only be reversed if clearly erroneous. *See* Federal Rule of Civil Procedure 52(a) ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

Referring to Rule 52, this Court has stated that "[t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573

---

[4] Lambright filed his federal petition for writ of habeas corpus in April 1987, prior to the effective date (April 24, 1996) of the AEDPA. (Pet. App. A, at 20, 490 F.3d at 1110.)

(1985). Thus, a district court's factual findings must be accepted absent a "definite and firm conviction that a mistake has been committed." *Id.*

In applying the clearly erroneous standard to factual findings of a district court, the reviewing court "must constantly have in mind that their function is not to decide factual issues de novo," and that the appellate court may not reverse such a determination "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* at 574. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.*

Although the Ninth Circuit acknowledged that it must defer to factual findings by the district court unless those findings are clearly erroneous (Pet. App. A, at 21, 490 F.3d at 1114), the Ninth Circuit's ruling pays only lip service to that principle. The Ninth Circuit repeatedly states that "evidence was presented" relating to issues it now deems significant, but neglects to mention evidence to the contrary or the district court findings that the evidence was not credible. For example, the Ninth Circuit cites to "evidence presented at the evidentiary hearing" to the effect that Lambright's mother beat him severely and regularly from the time he was a small child until he was fourteen years old, usually by whipping him with various objects, kicking him, or striking him." (*Id.*, 490 F.3d at 1110.) The panel neglects to mention, however, that Lambright did not report being abused, and he expressly denied any abuse by his parents when he was interviewed prior to sentencing by a mental health expert. (Pet. App. B, at 14.) Dr. Gina Lang, who examined Lambright prior to the evidentiary hearing, testified that when Lambright described the alleged beatings, he chuckled. (*Id.*)

Similarly the Ninth Circuit panel states that evidence "was presented" that one night after returning from Vietnam, Lambright "was hallucinating and appeared to be hiding from an imagined attacker. He kept saying 'I gotta get to 'em. I see 'em. They're burning Mama and Daddy, they're burning.'" (Pet. App. A, at 15, 490 F.3d at 1111). The Ninth Circuit links this information to other evidence that "was also presented" that "[w]hen [Lambright] returned from Vietnam, he seemed deeply traumatized and his personality had radically changed." (*Id.*) The Ninth Circuit neglects to acknowledge, however, a more likely cause of Lambright's mental health issues–his marital difficulties and belief his first wife was unfaithful–than his alleged combat experienced. (See Pet. App. B, at 14-18). The fact that evidence "was presented" does not establish its validity, and the Ninth Circuit's opinion repeatedly ignores this reality.

The Ninth Circuit's brazen assertion that trial counsel "spent only five and a half hours obtaining evidence and preparing for the penalty phase," (Pet. App. A, at 33, 490 F.3d at 1119), ignores the evidence presented at the hearing. Lambright's trial counsel undertook a significant mitigation investigation prior to sentencing, and he properly relied on information gathered by the probation department and on a report from the court-appointed mental health expert. Lambright's trial counsel traveled to Texas and Louisiana and spent 5 days interviewing Lambright's family and friends. Lambright's sister told him about his social and living conditions before the crime and general information about Lambright's background. (Pet. App. B, at 21.) Although trial counsel lacked independent recollection at the evidentiary hearing about specific details of his mitigation investigation, the disclosure he submitted prior to sentencing indicated that he had requested Lambright's medical records from the Veteran's Administration in Texas. Trial counsel testified at the hearing that he must have known before trial about

Lambright's psychiatric hospitalization, particularly given the fact that he emphasized Lambright's breakdown in his pre-sentencing mitigation memorandum, stating that Lambright "relates this hospitalization directly to his Vietnam military experience." (Pet. App. B, at 22.) The district court's ruling noting trial counsel's extensive preparation is supported by the record, and is not clearly erroneous.

The Ninth Circuit's willingness to substitute its own judgment for that of the district court violates basic principles of deference, and this Court should exercise its supervisory authority to reverse the Ninth Circuit's ruling and thereby ensure a more consistent standard of review in cases involving reasoned factual determinations by a district court.

III. ***The Ninth Circuit's ruling interferes with the interests of justice as well as the State's and crime victims' interest in finality.***

The Ninth Circuit's decision to substitute its judgment for that of the district court presents the State with a constantly moving target that thwarts the interests of justice. In 2001, this case had already been pending in federal court for 14 years when the Ninth Circuit ordered an evidentiary hearing to address Lambright's ineffective assistance of counsel claim. Six years later, after painstakingly disproving the factual predicates of Lambright's assertions underlying the Ninth Circuit's 2001 remand order, the State is now faced with the prospect of a resentencing, notwithstanding a paucity of new evidence beyond that considered by the original sentencer in 1982.

In ordering a remand in 2001, the Ninth Circuit noted that evidentiary development was warranted because (1) trial counsel apparently overlooked compelling evidence underlying a claim of post-traumatic stress disorder based on

Lambright's self-reported traumatic combat experiences in Vietnam; (2) trial counsel should have interviewed Lambright's only sibling to obtain family history information; and (3) trial counsel should have pursued evidence relating to Lambright's history of drug abuse.

Following extensive discovery and evidentiary development, the district court concluded that these alleged deficiencies in counsel's performance were based on unsupported allegations or related to evidence that was in fact presented at the time of sentencing. For example, Lambright's alleged mitigation evidence relating to combat service in Vietnam was a complete sham and fabrication. Lambright claimed that he was sent out on patrols and was involved in skirmishes with the Viet Cong, including one where several of his military buddies were killed. (Pet. App. B, at 21. Lambright further claimed that after returning to the States, he had several flashback experiences where he imagined being attacked again. (*Id.*) Although Lambright was a mechanic with scarcely any combat training, and although he was not a member of the security police squadron responsible for defending the base, he claimed he experienced combat while serving as an augmentee and leading a patrol of other augmentees. (*Id.* at 20-22.). Lambright testified that his best friend and fellow augmentee, whose first name Lambright could not recall and whose last name Lambright could neither spell nor precisely remember, was cut in half by machine gun fire and died with his "guts hanging out" in Lambright's arms. (*Id.* at 23.)

In fact, there was no combat engagement such as Lambright described in his testimony and there were no casualties of any kind in that time frame at or near the base where Lambright was stationed. (*Id.*)

Lambright acknowledged that there was no official documentation of the traumatic combat incident, but attributed the absence of documentation to a federal governmental conspiracy for the purpose of manipulating information on casualty figures. (Pet. App. B, at 23.) In contrast, five other fact witnesses (including commanding officers) who served at the Phu Cat Air Base where Lambright was stationed expressly rejected Lambright's story and testified that no United States Air Force personnel were killed in any attack that occurred while Lambright was stationed at the air base. (*Id.*)

Lambright initially claimed that his best friend in Vietnam—the man who died in his arms in the alleged combat event—was named "Neinhart." (*Id.*) He embellished the story by stating that he visited "Neinhart's" parents in Texas a few years after returning from the war, and he told how Mr. and Mrs. Neinhart clung to the belief that their son was not dead, but was merely missing in action. Lambright's pre-hearing disclosure documents identified "Mr. and Mrs. Neinhart" as potential witnesses, describing them as "parents of Petitioner's friend in Veitnam War" who would testify "concerning their knowledge of Petitioner, including his post-war visit to them informing them of their son's death."

When Lambright testified at the evidentiary hearing, he indicated that when he tried to report the incident during which Neinhart died, he was told "it didn't happen." (*Id.*) Lambright testified that when he returned to his bunk, he saw that Neinhart's belongings had been removed and a sign said that Neinhart had gone TDY (on temporary duty at a different location). When Lambright described this event in court, he wept softly. (*Id.*)

Although Lambright never could remember his best friend's first name, his recollection of his friend's last name ultimately confirmed the falsity of his story. A man named "Frederick Neidhardt" was stationed with Lambright at Dyess Air Force Base in Texas in 1967-68. (Pet. App. C, at 2.) Mr.. Neidhardt provided a signed affidavit stating that he was stationed at Dyess Air Force Base in Texas at the same time, and in the same unit, as Lambright; that he had never been in combat; and that he had not seen or communicated with Lambright since early 1967. (Pet. App. C, at 2-3.) Neidhardt and Lambright appear to have been fairly close friends, to the point where Lambright accompanied Neidhardt on several visits to Neidhardt's cousins' home in Abilene, Texas. (*Id.* at 3.) Confronted with Neidhardt's affidavit at the evidentiary hearing, Lambright disavowed any knowledge or insight as to who the affiant was. (Pet. App. B, at 23-24.)

Lambright's federal habeas attorneys repeatedly advised the court and the State that they had not been able to obtain any further information about "Neinhart" or his parents, even though they had contacted Frederick Neidhardt by telephone months earlier, either personally or through an investigator, and even joked with him that he was "supposed to be" a combat fatality. (Pet. App. C, at 3.)

Not surprisingly, the district court found, after reviewing all of the evidence and assessing the credibility of witnesses, that "[Lambright's] combat tale is a fabrication." (Pet. App. B, at 32.)

Although conceding that the "evidence presented at the hearing indicated that [Lambright's Vietnam combat experience] did not occur" (Pet. App. A, at 15-16, 490 F.3d at 1111), the Ninth Circuit ignored the ramifications of that finding. The fact that Lambright fabricated his Vietnam

combat experience was significant not only because it undermined Lambright's credibility in asserting evidence of mitigation, but also because it refuted the basis for Lambright's mental health expert's diagnosis that Lambright suffered from PTSD. The primary mental health expert testimony Lambright presented at the hearing was from Dr. Barry Morenz, who diagnosed Lambright as having PTSD based on his combat experience in Vietnam. Again not surprisingly, the district court found Dr. Morenz' testimony to be unpersuasive. (Pet. App. B, at 32-33.)

The absence of any credible evidence that Lambright suffered from PTSD belies the Ninth Circuit's finding that Lambright's trial counsel was ineffective for failing to further investigate Lambright's mental health. After more than two decades of litigation, including two years spent preparing for an evidentiary hearing in district court, the only credible evidence relating to Lambright's mental health is a diagnosis of anti-social personality disorder, which was made by a mental health expert prior to sentencing, and which was confirmed by the State's expert (Dr. Gina Lang), who the district court found to be more credible than Lambright's expert, Dr. Morenz. (Pet. App. B, at 28, 39.)

The remaining evidence Lambright proffered at the evidentiary hearing was similarly unpersuasive and undercut the basis for the Ninth Circuit's 2001 remand order. The 2001 decision credited an affidavit from Lambright's sister, Mildred Fontenot, stating that Lambright was "kind, gentle and well-behaved" before serving in Vietnam, and that "his behavior and manner were greatly changed" when he returned. 241 F.3d at 1207. The Ninth Circuit pointedly criticized trial counsel for failing to interview Fontenot in preparation for trial and/or sentencing. *Id.* However, that criticism was misplaced because trial counsel had in fact interviewed her, as well as many other potential witnesses

identified by Lambright before sentencing, during a 5-day visit to Orange, Texas and vicinity in 1982. (Pet. App. D, at 3-7.)

The 2001 remand order similarly relied on an affidavit from Donald Stonefeld, a psychiatrist "with a sub-specialty in neurology and post-traumatic stress disorder" who concluded, based solely on documents provided to him by Lambright's attorneys, that Lambright suffered from PTSD. 241 F.3d at 1207. Lambright did not call Dr. Stonefeld as a witness or otherwise rely on him at the evidentiary hearing.

Similarly, Lambright's claim of chronic methamphetamine abuse derived solely from his own statements and documents selected by his attorneys and furnished to experts they had enlisted. The 2001 Ninth Circuit remand decision concluded that a hearing was necessary in part because Dr. Stonefeld opined that Lambright had "a probable disorder due to excessive drug use," and because a pharmacologist named Martha Fankhauser had "concluded that 'chronic amphetamine use such as is reported by Mr. Lambright may cause long-term psychiatric changes including anxiety reactions [and] psychosis.'" 241 F.3d at 1207. Fankhauser, like Stonefeld, did not testify or provide any other evidence at the evidentiary hearing. Moreover, Lambright failed to produce any witness who could confirm his alleged chronic drug abuse, and he refused to testify concerning his alleged drug use in the days and weeks preceding the murder.

In short, the district court's ruling rejecting Lambrights' ineffective assistance of counsel claim is clearly supported by the record, and the Ninth Circuit erred by rejecting the district court's reasoned conclusions that the evidence Lambright proffered at the evidentiary hearing was

unsubstantiated or cumulative to evidence already before the sentencing court.

The Ninth Circuit's ruling undermines the State of Arizona's and crime victims' interest in the finality of its criminal judgments and convictions. The ruling similarly undermines confidence in the judicial system because it demonstrates a willingness to set aside a valid sentence without a compelling basis for doing so. Despite the best efforts of highly qualified counsel throughout state and federal post-conviction proceedings, the most credible diagnosis of Lambright's mental health at the time of the crime is anti-social personality disorder, a diagnosis that is generally entitled to very little weight, if any, in determining whether leniency is warranted. *See, e.g., State v. Jones*, 197 Ariz. 290, 312, 4 P.3d 345, 367 (2000); *State v. Brewer*, 170 Ariz. 486, 505-06, 826 P.2d 785, 802-03 (1992); *State v. Gerlaugh*, 144 Ariz. 449, 459, 698 P.2d 694, 704 (1985) (holding that a personality disorder, standing alone, is entitled to little, if any, mitigating weight, particularly when the defendant demonstrates an ability to control his conduct in different situations).

Lambright's remaining mitigation, again after exhaustive discovery efforts by counsel in state and federal court, consists of evidence of a somewhat difficult family background and drug use, although neither are connected to the crime, and neither are given great weight in capital sentencing proceedings. A difficult family background, in and of itself, is not a significant mitigating circumstance, since nearly every defendant could point to some circumstance in his or her background that would thus call for mitigation. *State v. Wallace*, 160 Ariz. 424, 427, 773 P.2d 983, 986 (1989). "[A]lthough such evidence may be especially relevant in the case of a minor, 'we ascribe to adult offenders [] a greater degree of personal responsibility

for their actions.'" *Id.*

Similarly, a history of drug abuse is not significantly mitigating absent a link to the crime. *See Sansing*, *supra.* Thus, the Ninth Circuit has ordered a resentencing based on evidence that is generally present in any capital case, but is not sufficiently substantial to warrant leniency.

This case is emblematic of the Ninth Circuit's continuing interference with the State's implementation of the death penalty. In *Landrigan v. Shriro*, 127 S. Ct. 1933 (2007), this Court recently reversed a Ninth Circuit decision in a case that had similarly been pending in federal court for more than a decade and involved an assertion of ineffective assistance of counsel. This Court held that the Ninth Circuit erred by substituting its judgment for reasoned factual findings by a state court that had denied Landrigan's request for an evidentiary hearing regarding his claim of ineffective assistance of counsel. 127 S. Ct. at 1944.

Although *Landrigan* was an AEDPA case, the same principles of deference apply here, where the case involves factual findings made following an evidentiary hearing by a factfinder who considered evidence and assessed the credibility of witnesses.

Also emblematic of the Ninth Circuit's refusal to defer to reasoned factually findings by a district court judge is *Correll v. Ryan*, 465 F.3d 1006 (9th Cir. 2006), a case the Ninth Circuit referenced repeatedly in the instant case as having "strikingly similar" facts. (Pet. App. A, 490 F.3d at 1117-18).

The State agrees that the facts in this case are strikingly similar to those in *Correll*, but in a manner

different from that asserted by the Ninth Circuit. *Correll* similarly involved a remand order from the Ninth Circuit and an evidentiary hearing in which a highly respected district court judge rejected a claim of ineffective assistance of counsel after carefully considering evidence presented during a 9-day evidentiary hearing. A Ninth Circuit panel nevertheless rejected the district court's conclusions and substituted its view for that of the district court judge.

Writing in dissent from the Ninth Circuit panel opinion, Judge O'Scannlain noted that the district court had conducted a thorough hearing, which included 17 witnesses and "reams of documents." The district court had rejected an allegation that Correll's attorneys only spent five minutes with him between conviction and sentence, and found instead that counsel met with Correll multiple times and discussed the mitigation case with him extensively. The district court also found that trial counsel spoke to between 40 and 50 witnesses, including all of Correll's family members who would cooperate, but that, unfortunately, "[t]he witnesses were not able to provide relevant useful mitigation information. In fact, in many instances, the witnesses only provided inculpatory and non-mitigating information." 465 F.3d 1006, 1022-23 (9th Cir. 2006). Judge O'Scannlain thus rejected the other panel members' conclusion that the district court erred in denying the ineffective assistance of counsel claim:

> I respectfully dissent from the court's conclusion that Correll has met the "highly demanding and heavy burden of establishing actual prejudice" in the pursuit of his claim of ineffective assistance of counsel during the penalty phase of the trial . . . The majority ignores the mountain of precedent which provides that, in assessing prejudice, we must consider not only the likely benefits of the

> mitigating evidence counsel failed to present, but also its likely drawbacks. *The majority also substitutes its independent analysis of the record for that of the district court, and relies on its own view of the evidence* rather than considering, as we must, the effect the evidence would have had on an Arizona sentencing judge twenty-two years ago.

465 F.3d at 1019 (emphasis added).

On October 13, 2006, the State of Arizona filed a motion seeking en banc review of the panel decision in *Correll*. That petition remains pending as of the date of filing of the instant certiorari petition. The State believes that the "strikingly similar" facts of *Correll* do not justify the result reached by the Ninth Circuit in the instant case, and instead demonstrate the pitfalls of the Ninth Circuit's standardless, non-deferential review of reasoned factual findings and conclusions reached by a district court after a thorough evidentiary hearing.

. . . .

. . . .

CONCLUSION

The petition for a writ of certiorari should be granted.

	Respectfully submitted TERRY GODDARD Attorney General MARY O'GRADY Solicitor General KENT E. CATTANI Chief Counsel Capital Litigation Section PATRICIA A. NIGRO Assistant Attorney General (Counsel of Record) Capital Litigation Section 1275 W. Washington Phoenix, Arizona 85007 Telephone: (602) 542–4686

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief is single spaced, uses a 12-point proportionately-spaced typeface, and contains 7,901 words.

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

PATRICIA NIGRO
Assistant Attorney General
(Counsel of Record)

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Joe Leonard Lambright, *Petitioner-Appellant,* v. Dora B. Schriro, Director of Arizona Department of Corrections, Respondent-Appellee.	)	No. 04-99010 D.C. No. CV-87-00235-TUC-JMR ORDER AMENDING OPINION AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
John M. Roll, District Judge, Presiding

Argued and Submitted
April 3, 2007—Pasadena, California

Filed May 11, 2007
Amended July 2, 2007

Before: Warren J. Ferguson, Stephen Reinhardt, and David R. Thompson, Circuit Judges.

Per Curiam Opinion;
Concurrence by Judge Ferguson

COUNSEL

Jon M. Sands, Federal Public Defender, Dale A. Baich and Jennifer Y. Garcia, Assistant Federal Public Defenders, Phoenix, Arizona, for the petitioner-appellant.

Terry Goddard, Attorney General of the State of Arizona, Kent E. Cattani, Chief Counsel, Capital Litigation Section, and Patricia A. Nigro, Assistant Attorney General, Capital Litigation Section, Phoenix, Arizona, for the respondent-appellee.

ORDER

The per curiam opinion filed May 11, 2007 is hereby amended as follows:

1. At page 5476, line 15 of the slip opinion, the word "few" is changed to "number of."

2. At page 5495, line 34 of the slip opinion, the word "few" is changed to "number of."

With these amendments, Judges Ferguson, Reinhardt, and Thompson vote to deny the petition for rehearing.

Judge Reinhardt votes to deny the petition for rehearing en banc; Judges Ferguson and Thompson so recommend. The full court was advised of the suggestion for rehearing en banc. No judge requested a

vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

No future petitions for rehearing or rehearing en banc will be entertained.

OPINION

PER CURIAM:

In this pre-AEDPA habeas appeal, we confront once again the question whether defense counsel's performance during the sentencing phase of a capital trial was so deficient as to violate the defendant's right to counsel under the Sixth Amendment. In March of 1982, Appellant Joe Leonard Lambright and his co-defendant Robert Smith were convicted of first degree murder, kidnapping, and sexual assault. After a brief sentencing proceeding, Lambright was sentenced to death. His conviction and sentence were affirmed by the Arizona courts on direct appeal and in state post-conviction proceedings. Lambright then filed a habeas petition in federal district court seeking reversal on various grounds. The district court denied the petition, and Lambright appealed. In 1999, we reversed his conviction on the ground that the use of dual juries for a single trial of both Lambright and Smith violated due process. The en banc court then reheard the case, reversed the panel decision, and affirmed the denial of habeas relief with respect to the dual jury issue. After

the case was returned to the panel for resolution of Lambright's remaining claims, we rejected all of his contentions with the exception of penalty phase ineffective assistance of counsel. With respect to that issue, we remanded to the district court for an evidentiary hearing. After the evidentiary hearing, the district court ruled that Lambright's trial counsel had not provided deficient representation, and further ruled that even if the performance was deficient, Lambright was not prejudiced thereby. Because we conclude that trial counsel's performance was both deficient and prejudicial, we reverse and remand for issuance of a writ of habeas corpus and a new sentencing proceeding.

FACTUAL AND PROCEDURAL BACKGROUND

In March of 1980, Lambright and Smith were traveling across the country with Lambright's girlfriend, Kathy Foreman. According to Foreman, who testified against Smith and Lambright in exchange for immunity, Smith complained to Lambright about the fact that he did not have a traveling companion with whom he could engage in sexual relations. In response, Lambright said they would find him a girl. Lambright also said that "he would like to kill somebody just to see if he could do it." While passing through the Tucson, Arizona area, the trio encountered a hitchhiker, Sandra Owen, and offered her a ride. Owen accepted, got in the car, and the four drove off. Smith raped Owen in the back seat of the car on the way to a mountain site where they all exited the vehicle. Smith then raped Owen a second time and thereafter began choking her. Lambright

then stabbed Owen numerous times while Smith and Foreman restrained her. Finally, Lambright struck Owen in the head with a rock. Owen died as a result of her injuries.[1]

After the trio was arrested, Lambright admitted involvement in the offense, but told the police that Smith was the one who murdered Owen. Smith told police that Foreman and Lambright committed the murder. Foreman turned state's evidence and testified that Lambright and Smith were the real culprits. On March 30, 1982, both Lambright and Smith were convicted of first degree murder, sexual assault, and kidnapping. The state sought and obtained the death penalty for both.

I. Trial Counsel's Penalty Phase Investigation

At both the guilt and penalty phases of his trial, Lambright was represented by attorney Carmine Brogna. Between Lambright's conviction and the sentencing hearing, Brogna met with Lambright once for a little over an hour and spoke with him once briefly over the phone. He spent less than an hour reviewing the pre-sentence report and speaking with Lambright's probation officer, and a total of three hours drafting and dictating the brief sentencing memorandum he submitted to the court and the subpoena he used for the appearance of his sole penalty phase witness, a guard at the jail in which Lambright was being held.

---

[1] A fuller description of these events appears in our earlier en banc opinion. *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999).

Although prior to sentencing Brogna became aware of Lambright's long history of mental health problems, his two prior suicide attempts, and his resultant hospitalization in a psychiatric facility, Brogna did not discuss these matters with Lambright's friends or family members, nor did he request Lambright's medical or hospital records. Moreover, although he knew that Lambright had discussed traumatic combat experiences in Vietnam with the probation officer assigned to prepare a pre-sentence report and with the Pima County Court's psychologist, he did not attempt to obtain any information about Lambright's experiences in Vietnam nor their effect on him. Even after the court's psychologist drafted a report in which in which he concluded that Lambright suffered from antisocial personality disorder, Brogna did not contact the psychologist to discuss this diagnosis, nor did he attempt to have another psychologist or psychiatrist evaluate Lambright.

Brogna also knew that Lambright had a serious drug problem, but did no investigation with respect to the extent of his drug use or its effect on his mental state or behavior. He likewise did not seek to obtain Lambright's school or military records. Nor did he contact either of Lambright's former wives. Although Brogna traveled with counsel for Lambright's co-defendant to Texas and Louisiana for five days and spoke with a number of potential witnesses prior to the guilt phase of Lambright's trial, the trip did not yield any useful mitigating evidence, and Brogna did no additional investigating thereafter. It is unclear whether Brogna sought information for use at the

penalty phase proceeding from any of the people he spoke with during this trip. Although Brogna did speak to Lambright's sister when he was in Texas, he asked her primarily about Lambright's conduct around the time of the crime, and he does not recall whether he even raised the issues of Lambright's upbringing, mental health, drug abuse, or any other potential mitigating factors.

II. Presentation of Mitigating and Aggravating Evidence

The sum total of the mitigating evidence that Brogna offered at sentencing comprises less than three pages of a double-spaced transcript, and all of it related solely to Lambright's conduct in jail. Although, as noted above, Brogna knew that there were indications that Lambright was mentally ill, Brogna failed to present any mitigating psychiatric or psychological testimony. Nor did he call any of Lambright's family members or friends to testify about his unfortunate childhood, his history of mental instability, his suicide attempts, or his long-term drug abuse. Instead, Brogna promised the court that he had "one witness who will be very brief." The sole witness called by Brogna was George Dinnen, an officer at the Pima County Jail, who testified that in the six months in which he had supervised Lambright, there had been no "problems with him" and that he had "always been respectful, courteous, and cooperative." In addition to calling this witness, Brogna submitted a two-and-a-half-page legal memorandum listing various potentially mitigating circumstances, including (1) the fact that a deal was cut with Lambright's accomplice,

Kathy Foreman, in exchange for her cooperation with the prosecution, (2) Lambright's "lack of a prior violent criminal record," (3) "the Defendant's record while incarcerated," (4) that Lambright "is amenable to some type of treatment," (5) the fact that his "military record is a good one," and (6) that "[t]here is no record indicating he was a 'juvenile delinquent.'" None of these potentially mitigating circumstances was described with any particularity, nor did Brogna point to any evidence in the record to support the assertions made in his memorandum.

In addition to the scant mitigating evidence alluded to by Brogna, the sentencing judge considered the pre-sentence report prepared by the probation officer assigned to the case, a report written by Dr. Richard Hinton – a clinical psychologist with the Pima County Court's clinic – and the testimony of the prosecution's sole penalty phase witness, who was the lead detective on the case, and who testified about the circumstances under which the victim was raped and murdered.

Dr. Hinton's report was based on a psychological evaluation of Lambright, which he performed shortly after Lambright's conviction. Brogna did not provide Dr. Hinton with any information regarding Lambright's childhood, his service in the military, his history of mental health problems, his medical history, or his long-term drug abuse, either prior to the time that Dr. Hinton conducted his evaluation or prior to the time that he prepared his report. As a result, Dr. Hinton relied exclusively on his interview with Lambright and on police reports, newspaper articles,

and other materials related to the offense.

Dr. Hinton's report, which presented a very negative and damning picture of Lambright, contained some basic information about potentially mitigating aspects of Lambright's background, including the fact that Lambright had moved frequently as a child, that he had served in the Air Force in Vietnam during which time he had allegedly engaged in hand-to-hand combat, that he had once suffered a nervous breakdown which necessitated his admission to the psychiatric unit at a Veterans Administration hospital in Houston, Texas, that he attempted suicide on two occasions, and that he had a long history of drug abuse. Based on his interview with Lambright, Dr. Hinton diagnosed him with antisocial personality disorder and included this diagnosis in his report.

The pre-sentence report, like Dr. Hinton's report, contained some potentially mitigating information regarding Lambright's personal history but was overwhelmingly more aggravating than mitigating. It contained a detailed description of the offense, a summary of a telephone conversation between the victim's mother and the probation officer who prepared the report, in which the victim's mother stated that both defendants should receive the death penalty. It also contained a summary of the defendant's social history, emphasizing his negative personality traits and behavior. The presentence report did note, however, that "[t]he defendant has no official, verifiable record of juvenile offenses," that Lambright had been raised by "a very strict, hypochondriacal, Pentecostal mother," and that "[a]t the age of nine or

ten, he began running away from home."

Regarding Lambright's history of mental health problems, the pre-sentence report contained the following information:

> [T[he defendant described how he had a breakdown after his return from Viet Nam, apparently experiencing generalized feelings of paranoia in conjunction with feelings of failure over his first marriage. His sister described how they found him cowering on their front porch one evening, holding a butcher knife to protect himself from imagined attackers. After spending three days in a Houston veterans administration hospital, he left against medical advice. Attending physicians apparently told his sister that if the defendant did not receive long-term therapy, he would probably spend the rest of his life running from place to place . . .

As for Lambright's history of drug use, the pre-sentence report noted that "[t]he defendant has used and abused various substances over the past ten years, most notably marijuana, amphetamines, and alcohol. . . . He has never received any type of treatment for substance abuse."

Brogna's argument at the close of the sentencing proceeding, like his presentation of mitigating evidence, was extremely brief. He asked the court to consider the fact that Kathy Foreman, although a direct participant in the crime, received no punishment, stated that Dr. Hinton's conclusion that

Lambright suffers from antisocial personality disorder was unfounded, and asked the court to consider Lambright's lack of a violent history. He did not ask for leniency, but instead, without any explanation of his reasons, merely requested that the court impose a sentence of life in prison.

III. The Death Verdict and State Appeals

After the very brief sentencing proceeding, the sentencing judge found that only one aggravating circumstance existed, namely "that the offense was committed in an especially heinous, cruel or depraved manner." He nonetheless sentenced Lambright to death because he found that the limited mitigating evidence presented was insufficiently substantial to outweigh this single aggravating factor. The judge noted that under Arizona law, "'[t]he Court . . . *shall* impose a sentence of death if it finds one or more aggravating circumstances and finds no mitigating circumstances sufficiently substantial to call for leniency.'" In light of his finding that the mitigating evidence presented was insubstantial, he concluded that "the law demands the maximum penalty . . ." The sentencing judge did not list Lambright's long history of substance dependency or his mental heath problems among the mitigating factors he considered. With respect to Lambright's childhood, he said only that Lambright's "unsettled early life" was not significantly mitigating. Lambright's conviction and death sentence were affirmed by the Arizona Supreme Court both on direct appeal and in subsequent state habeas proceedings. *State v. Lambright*, 673 P.2d 1 (Ariz. 1983). Thereafter, in April of 1987, Lambright

petitioned for federal habeas corpus relief on various grounds.

IV. Federal Habeas Review

In July of 1996, the district court denied Lambright's habeas petition, and Lambright appealed. In January of 1999, we issued an opinion reversing his conviction on the ground that the "single trial before 'dual juries'" violated his right to due process under the Fourteenth Amendment. *Lambright v. Stewart*, 167 F.3d 477, 479 (*Lambright I*), *withdrawn*, 177 F.3d 901 (9th Cir. 1999). The court later reheard the case en banc, reversed the panel's decision, and affirmed the district court's denial of relief with respect to the dual jury issue. *Lambright v. Stewart*, 191 F.3d 1181, 1182, 1187 (9th Cir. 1999) (en banc) (*Lambright II*). The case was then returned to this panel for resolution of Lambright's remaining claims. *Id.* at 1187. We affirmed the district court's denial of his habeas petition with respect to all of his guilt phase claims and all but one of his penalty phase claims, but reversed the district court's ruling that his penalty phase ineffective assistance of counsel claim had been procedurally defaulted. *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir. 2001) (*Lambright III*); *Lambright v. Stewart*, 5 Fed. Appx. 712, 713-15 (9th Cir. 2001). After finding that Lambright "presented more than enough evidence to establish a colorable claim for deficient performance[,]" we remanded the case to the district court for an evidentiary hearing on the issue of "whether Lambright was denied effective assistance of counsel at sentencing because of the failure to investigate and present evidence of his psychiatric condition and social

history." *Lambright III*, 241 F.3d at 1208.

V. The Evidentiary Hearing

In November of 2003, the district court held a six-day evidentiary hearing on the issue of ineffective assistance of counsel. The testimony, affidavits, and other evidence introduced at the evidentiary hearing revealed that there was a substantial amount of mitigating evidence that Brogna could have investigated, developed, and presented at Lambright's sentencing hearing. With respect to Lambright's childhood, the evidence presented at the evidentiary hearing revealed that Lambright's mother beat him severely and regularly from the time he was a small child until he was fourteen years old, usually by whipping him with various objects, kicking him, or striking him.

Testimony at the hearing also revealed that Lambright's mother presented symptoms of severe hypochondria, and was profoundly addicted to prescription drugs throughout Lambright's childhood. She took sleeping pills, Valium, and Darvon on a daily basis and, as a result, spent most of her time in bed, leaving Lambright to fend for himself. Starting around the time that he was nine years old, she often forced him to take sedatives in order to make him settle down to sleep. She was also extremely verbally and emotionally abusive toward Lambright throughout his childhood. Lambright's father ignored his wife's abusive behavior and did nothing to stop it.

Evidence was also presented regarding the poverty

that Lambright experienced as a child. According to Lambright's sister, the family was "very poor" throughout their childhood. They often lived in homes with no running water or indoor plumbing. Once they were forced to move into a rat-infested house in which the walls and ceilings were lined with cardboard to block holes. Moreover, through Lambright's childhood, his family moved every six to nine months because his father had difficulty maintaining steady employment. As a result, Lambright never attended the same school for more than a year, had difficulty forming relationships with classmates, and was a frequent target of bullies. He stopped attending school altogether after the ninth grade.

Evidence related to Lambright's mental heath problems and long history of drug abuse was also presented. Lambright's first wife testified that, prior to 1968 when Lambright was deployed to Vietnam, he was a kind, gentle, and loving person who neither drank nor did drugs. When he returned from Vietnam, he seemed deeply traumatized and his personality had radically changed. He had trouble maintaining stable, healthy relationships, was constantly jumpy and agitated, had difficulty sleeping, was plagued by nightmares, and became deeply depressed. He would often lock himself in another room and would say that he wished he were dead. He eventually became so despondent that he attempted suicide by driving his car into a tree.

On one occasion, Lambright's sister awoke to find him pounding on her door at two o'clock in the morning. When she came to the door, she saw

Lambright cowering against a wall, swinging a butcher knife. He was hallucinating and appeared to be hiding from an imagined attacker. He kept saying "I gotta get to 'em. I see 'em. They're burning Mama and Daddy, they're burning." During this incident Lambright was crying, incoherent, and "shaking all over."

Thereafter, Lambright was admitted to the mental health unit of the Houston VA hospital. After three days of treatment, Lambright left the hospital against the advice of his doctors because he was concerned about losing his job and not being able to support his wife and young son.

In 1970, Lambright began working as a truck driver and started using speed and diet pills to stay awake for long periods of time. In 1971, after his father's death, he became profoundly depressed and began drinking heavily and regularly. In 1972, Lambright began using marijuana and experimenting with various other drugs, including acid, hash, cocaine, and mushrooms. In 1974, Lambright attempted suicide for a second time, this time by intentionally overdosing on drugs, and was briefly hospitalized as a result. Lambright began using crystal methamphetamine ("meth") in 1976 or 1977, and by 1979, he would stay high on meth for weeks at a time.

With respect to his time in Vietnam, Lambright testified about a traumatic combat experience in which he witnessed the violent death of a close friend who was shot and killed by the Vietcong. However, the testimony of other witnesses, as well as other evidence presented at the evidentiary hearing, indicated that

this event did not occur. Conceivably, it was a figment of Lambright's imagination. Also conceivably, it was a story he concocted.

Expert testimony was also presented with respect to Lambright's mental health and substance abuse problems. The psychiatrist who testified on Lambright's behalf, Dr. Barry Morenz, concluded that Lambright's Vietnam experience, along with the abuse Lambright experienced at the hands of his mother, caused Lambright to develop post-traumatic stress disorder ("PTSD"). The psychologist testifying on behalf of the state, Dr. Gina Lang, rejected this diagnosis, primarily because she believed that Lambright's account of his experience in Vietnam was fabricated. Both experts agreed, however, that Lambright suffers from a depressive disorder and from polysubstance dependency. Dr. Lang also concluded that Lambright suffers from a personality disorder with antisocial, borderline, and inadequate features.

Dr. Hinton, the psychologist who submitted a report to the sentencing judge in 1982 stating that Lambright suffered from antisocial personality disorder, also testified at the evidentiary hearing. He initially stated that if he had been provided by Brogna with information about Lambright's background, he might have been inclined to infer that Lambright suffered from PTSD, but upon cross-examination acknowledged that such a diagnosis would be improbable. He did not deny, however, that Lambright suffered from some type of mental disorder.

VI. The District Court's Memorandum of Decision and Order

On August 30, 2004, the district court issued a memorandum of decision and order denying Lambright's habeas petition. The court found that "Petitioner's testimony with respect to the trauma underlying his expert's PTSD diagnosis (the alleged combat experience) is less than credible." The court further found Dr. Morenz's PTSD diagnosis unpersuasive because it "rests almost exclusively on the alleged combat experience as the traumatic trigger event," and instead found Dr. Lang's assessment of Lambright's mental health problems to be the more persuasive of the two. Moreover, the court stated that even if it were "persuaded that Petitioner suffered from PTSD, Petitioner has failed to show how the disorder affected his criminal behavior." The court further found "no credible evidence that methamphetamine abuse contributed to Petitioner's criminal actions" and that "Petitioner . . . presented no evidence to support the assertion that he was under the influence of drugs at the time of the crime."

Analyzing Lambright's claim of ineffective assistance of counsel, the district court concluded that Brogna had provided adequate representation in spite of the fact that he failed to present mitigating evidence related to Lambright's prolonged drug abuse, mental health problems, and abusive childhood. With regard to the drug abuse, the court stated that it "cannot say that it was unreasonable not to focus on drug abuse as a mitigating factor in the absence of any explanatory nexus to the crime." Turning to Brogna's failure to

present evidence related to Lambright's history of mental instability and specifically his experiences in Vietnam, the court stated that

> [c]ounsel cannot be faulted for failing to investigate PTSD when neither Petitioner, his sister nor Dr. Hinton suggested that the few months Petitioner spent in Vietnam so altered him that the experience provided a possible explanation for Petitioner's participation in the killing.

The court made no further comment regarding Lambright's mental instability or the expert testimony supporting the existence of a mental disorder other than PTSD. With regard to Lambright's abusive childhood, the court concluded that "Petitioner's upbringing was not so horrific that it significantly affected Petitioner's conduct at the time of the crime." Accordingly, the court held that "Brogna's presentation [of mitigating evidence] was not constitutionally deficient."

The court further held that, "[a]ssuming Brogna's representation was objectively unreasonable, Petitioner is unable to establish that Brogna's errors prejudiced him." Specifically, the court concluded that

> [b]ecause Petitioner has failed to establish that he was in combat or suffered from PTSD, the Court cannot say that Petitioner's sentence would have been different had Brogna conducted a full-blown investigation into Petitioner's Vietnam experiences. Moreover,

> even if PTSD were a viable diagnosis, it has not been shown to have any explanatory or exculpatory attributes with respect to [the victim's] murder . . .

Regarding Lambright's substance abuse problem, the district court concluded that

> the sentencing judge was already well aware of it through the presentence report. . . . In addition, Petitioner never argued that he was under the influence of alcohol or drugs when he committed the murder. Therefore, any evidence of substance abuse could not have mitigated the circumstances of the crime itself.

With respect to Lambright's childhood, the court concluded that "Petitioner's childhood, though bleak, was largely identified to the sentencing judge. . . . The Court has already noted that Petitioner failed to prove his upbringing affected his ability to know right from wrong or to control his conduct." Based on these conclusions, the court held that because "the avenues of potential mitigation evidence are either unsubstantiated or were already before the sentencing judge, the Court is not persuaded that any deficiencies in counsel's representation rendered the sentencing proceeding 'fundamentally unfair or unreliable.'"

On appeal, Lambright argues that the district court erred in (1) holding that Brogna's investigation and presentation of mitigating evidence was not constitutionally deficient, and (2) holding that any deficiency in Brogna's performance was not prejudicial.

Lambright also argues that the district court committed two specific errors in reaching these conclusions: (1) that it erroneously required a causal nexus between his proffered mitigating evidence and the crime, and (2) that it erred in concluding that Lambright could not assert, during cross-examination, a Fifth Amendment privilege with regard to questions related to the offense and likewise erred in drawing a negative inference regarding certain contested factual issues based on his refusal to answer such questions.[2]

DISCUSSION

1. Standard of Review

Lambright's federal habeas petition was filed prior to the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and thus, pre-AEDPA standards apply to his claims. *Douglas v. Woodford*, 316 F.3d 1079, 1085 (9th Cir. 2003). We

---

[2] We need not reach Lambright's argument that the district court erred in drawing adverse inferences based on his refusal to answer questions related to the crime as any error in drawing these inferences was harmless. Neither of the two inferences drawn is of consequence to our analysis of the ineffective assistance of counsel claim. The first adverse inference – that Lambright was not on drugs when he committed the offense – is irrelevant given that Lambright does not argue on appeal that he was in fact on drugs at that time but only that his history of drug addiction is a mitigating factor in an of itself. The second inference – that Lambright's alleged Vietnam experience did not affect his behavior at the time of the offense – is likewise irrelevant given that we hold, for purposes of this appeal, that the district court did not clearly err in finding that the allegedly traumatic experience never occurred.

review the district court's decision to deny habeas relief *de novo*. *Raley v. Ylst*, 470 F.3d 792, 799 (9th Cir. 2006). "Under pre-AEDPA law, we consider a claim alleging ineffective assistance of counsel as a mixed question of law and fact that we review *de novo*." *Summerlin v. Schiro*, 427 F.3d 623, 628 (9th Cir. 2005) (en banc) (citing *Rios v. Rocha*, 229 F.3d 796, 799 n.4 (9th Cir. 2002)). "We review for clear error, however, the district court's findings of fact." *Frierson v. Woodford*, 463 F.3d 982, 988 (9th Cir. 2006). Finally, "[b]ecause this is a pre-AEDPA case, we do not review the state court's legal conclusions to determine whether they are 'objectively unreasonable;' rather, we 'simply resolve the legal issue on the merits, under the ordinary rules.'" *Summerlin*, 427 F.3d at 628 (quoting *Belmontes v. Brown*, 414 F.3d 1094, 1101 (9th Cir. 2005), *rev'd on other grounds*, *Ayers v. Belmontes*, ___ U.S. ___, 127 S.Ct. 469 (2006)).

II. The District Court's Erroneous Application of a Nexus Requirement

[1] At the outset, we reject the district court's analysis with respect to deficient performance and prejudice because it is predicated on the application of a legal test that is clearly inapplicable. The district court disregarded virtually all of the mitigating evidence that Lambright presented at the evidentiary hearing on the basis that it had no "explanatory nexus" to the crime. In so doing, it misapplied controlling Supreme Court and Ninth Circuit precedent. In *Tennard v. Dretke*, 542 U.S. 274 (2004), the Supreme Court explicitly rejected the Fifth Circuit's requirement that mitigating evidence have some nexus

or causal connection to the crime of which the capital defendant was convicted in order for a jury's failure to consider that evidence to be deemed prejudicial. *Id.* at 289. The Court held that

> [t]he Fifth Circuit's test has no foundation in the decisions of this Court. . . . When we [have] addressed directly the relevance standard applicable to mitigating evidence in capital cases . . . we [have] spoke[n] in the most expansive terms. . . . The Fifth Circuit's test is inconsistent with these principles. Most obviously, the test will screen out any positive aspect of a defendant's character because good character traits are . . . no[t] typically traits to which criminal activity is "attributable."

Id. at 284-85. Turning specifically to the "nexus" element of the Fifth Circuit's test, the Court held that

> [t]he Fifth Circuit was . . . wrong to have refused to consider . . . [Tennard's claim] on the ground that Tennard had not adduced evidence that his crime was attributable to his low IQ. In *Atkins v. Virginia*, 536 U.S. 536 304, 316 (2002, we explained that impaired intellectual functioning is inherently mitigating . . . Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant

> mitigating evidence . . . unless the defendant also establishes a nexus to the crime.

Id. at 287.

In *Smith v. Texas*, 543 U.S. 37, 45 (2004), the Court reiterated that it had "rejected the . . . 'nexus' requirement in Tennard," and stated that "petitioner's evidence [regarding his troubled childhood and limited mental abilities] was relevant for mitigation purposes is plain under our precedents." *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302, 319-20 (1989); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991); *Boyde v. California*, 494 U.S. 370, 377-78 (1990); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982)). Indeed, the Court has characterized the "nexus" test as "a test we never countenanced and now have unequivocally rejected." *Id.*

[2] We, too, have addressed the question whether evidence with no explanatory nexus to the crime at issue should be considered mitigating in *Smith v. Stewart*, 140 F.3d 1263, 1271 (9th Cir. 1998), and we did so in the context of assessing whether counsel's deficient performance in a capital sentencing proceeding was prejudicial. *Id.* We held specifically that the issue of whether counsel's failure to present evidence related to antisocial personality disorder and long-term drug use was prejudicial did not turn on "whether those precluded [the defendant] from knowing right from wrong, as the postsentencing court and the district court seemed to have done for there to be a nexus between those factors and the crime. *Id.* Instead, we held that "they need not do so in order to

be . . . mitigators." *Id.*

The reason for rejecting a nexus requirement is clear: "'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender . . . as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Eddings*, 455 U.S. at 112 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). If evidence relating to life circumstances with no causal relationship to the crime were to be eliminated, significant aspects of a defendant's disadvantaged background, emotional and mental problems, and adverse history, as well as his positive character traits, would not be considered, even though some of these factors, both positive and negative, might cause a sentencer to determine that a life sentence, rather than death at the hands of the state, is the appropriate punishment for the particular defendant. This is simply unacceptable in any capital sentencing proceeding, given that "treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," and determining whether or not he is deserving of execution only after taking his unique life circumstances, disabilities, and traits into account, is constitutionally required. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

[3] Here, the district court relied heavily on its finding that Lambright had not shown a nexus between his proffered mitigating evidence and the crime, flatly rejecting the majority of the mitigating evidence he offered on that basis. Indeed, it is

apparent from the district court's order that it either did not consider mitigating any evidence without an explicit nexus to the crime, or that it gave such evidence de minimus weight. Because the district court's rejection of Lambright's mitigating evidence on that basis violates the rule set forth in *Tennard, Smith v. Texas*, *Smith v. Stewart*, and their predecessors, we hold that its analysis of Lambright's ineffective assistance of counsel claim was fundamentally flawed.

III. Ineffective Assistance of Counsel

We begin by assessing whether Brogna's performance at sentencing was so deficient as to violate Lambright's right to counsel under the Sixth Amendment. "The Sixth Amendment right to counsel in a criminal trial includes 'the right to the effective assistance of counsel.'" *Summerlin*, 427 F.3d at 629 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "This right extends to 'all critical stages of the criminal process,' including capital sentencing." *Id.* (citations omitted).

In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) his trial counsel's performance "fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984).

A. *Deficient Performance*

Under *Strickland*, counsel's competence is presumed and thus Lambright must rebut this presumption by demonstrating that Brogna's performance was unreasonable under prevailing professional norms and was not the product of sound strategy. *See id.* at 688-89. Judicial scrutiny of counsel's performance is highly deferential, and thus we must evaluate Brogna's conduct from his perspective at the time it occurred, without the benefit of hindsight. *Id.* at 689. "[S]trategic choices made after thorough investigation of [the relevant] law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690. However,

> Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances . . . *Id.* at 690-91; *see also Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. 690-91). Similarly, a decision not to present a particular defense or not to offer particular mitigating evidence is unreasonable unless counsel has explored the issue sufficiently to discover the facts that might be relevant to his

making an informed decision. *Wiggins*, 539 U.S. at 522-23; *Stankewitz v. Woodford*, 365 F.3d 706, 719 (9th Cir. 2004).

The Supreme Court has "declined to articulate specific guidelines for appropriate attorney conduct and instead ha[s] emphasized that 'the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688). "However, general principles have emerged regarding the duties of criminal defense attorneys that inform our view as to the 'objective standards of reasonableness' by which we assess attorney performance, particularly with respect to the duty to investigate. *Summerlin*, 427 F.3d at 629.

[4] For example, we have held that "'[t]o perform effectively . . . counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[] and explain[] the significance of all the available [mitigating] evidence.'" *Allen v. Woodford*, 395 F.3d 979, 1000 (9th Cir. 2005) (citing *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc)); *see also Summerlin*, 427 F.3d at 630. Indeed, we have consistently held that "'It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.'" *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999) (quoting *Caro v Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999)).

"To that end, the investigation should include inquiries into social background and evidence of family abuse." *Summerlin*, 427 F.3d at 630. Attorneys representing defendants in capital sentencing proceedings also have a "'duty to investigate and present mitigating evidence of mental impairment' . . . [,] [which] includes examination of mental health records." *Id.* (quoting *Bean v. Calderon*, 163 F.3d 1073, 1080 (9th Cir. 1998) and citing *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989)); *see also Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002). Furthermore, "counsel has an affirmative duty to provide mental health experts with information needed to develop an accurate profile of the defendant's mental health." *Caro v. Woodford*, 280 F.3d at 1254. "The defendant's history of drug and alcohol abuse should also be investigated." *Summerlin*, 427 F.3d at 630 (citing *Jennings v. Woodford*, 290 F.3d 1006, 1016-17 (9th Cir. 2002)). Lambright's counsel did almost none of this in the present case.

Moreover, when "tantalizing indications in the record" suggest that certain mitigating evidence may be available, those leads must be pursued. *Stankewitz*, 365 F.3d at 719-20; *see also Summerlin*, 427 F.3d at 632 (finding ineffective assistance where trial counsel failed to obtain readily available evidence concerning possible mental health mitigation where his client's prior attorney told him there were

indications that the defendant was mentally ill); *Wallace*, 184 F.3d at 1115-16 (finding ineffective assistance where trial counsel spent only two hours interviewing potential witnesses, just over thirty minutes with a psychiatric expert, and failed to contact known and willing witnesses); *Seidel v. Merkle*, 146 F.3d 750, 756 (9th Cir. 1998) (finding ineffective assistance where defense counsel "failed to conduct even a minimal investigation in order to make an informed decision" regarding his client's mental health defense).

In *Correll v. Ryan*, 465 F.3d 1006 (9th Cir. 2006), for example, we held that petitioner's trial counsel had been ineffective in failing to adequately investigate and present evidence related to the defendant's background, mental health problems, and long-term drug addiction at the penalty phase of his capital trial. *Id.* at 1012-15. We noted that Correll's attorney knew that, among other things, Correll came from a dysfunctional family, sustained a serious head injury, was committed to various psychiatric facilities, and that he was addicted to drugs; yet defense counsel did not obtain the records nor did he interview witnesses concerning these matters. Counsel did meet with the family members who would cooperate, but he admitted that he met only once with Correll's father, sister, and brother . . . and probably spent "[a] couple hours" with them. Counsel did not obtain Correll's school records . . .[He] did not obtain Correll's medical records. . . . [He] could

> not recall what efforts he made to gather Correll's psychiatric records, although defense counsel did remember that he did not obtain records from Correll's stays at various mental health centers.

Id. at 1011. Assessing counsel's mitigation investigation under the standards set forth above, we concluded that

> In light of the abundance of classic mitigation evidence of which counsel was aware, his almost complete failure to investigate is startling. . . . Defense counsel's failure to investigate falls far short of any objectively reasonable standard against which we might measure attorney performance under the standards of the Sixth Amendment.

Id. at 1011-12. Turning to counsel's presentation of evidence at the penalty phase, we observed that "[a]s anemic as the defense counsel's investigation was, his presentation of mitigating evidence . . . was [even] worse." *Id.* at 1012. Defense counsel "did not call a single witness to testify. He did not introduce any evidence. Rather, he elected to allow the judge to make a decision on whether to sentence Correll to death based solely on the state's evidence and the pre-sentence report." *Id.* Moreover, "[d]efense counsel's entire mitigation argument was contained in less than one page of a sentencing memorandum[.] . . . [and t]he entirely of his oral argument at the penalty phase consist[ed] of approximately 7 pages of transcript." *Id.* at 1013.

[5] The facts of the case at hand and those in Correll are strikingly similar Here, as in Correll, Brogna failed to do even a minimal investigation of "classic mitigation evidence," notwithstanding the fact that he knew such evidence potentially existed. Specifically, although prior to the imposition of the capital sentence Brogna became aware of Lambright's history of mental health problems, the fact that he had attempted suicide on two prior occasions, and that he had been hospitalized in a psychiatric facility as a result, Brogna did not discuss these issues with Lambright's friends or family members, nor did he request Lambright's medical or hospital records. Although he knew that Lambright had discussed traumatic experiences in Vietnam with the probation officer assigned to prepare the pre-sentence report and with the Pima County Court's psychologist, he did not attempt to obtain any information about these experiences or their effect on him. Even after the court's psychologist prepared a report in which he concluded that Lambright suffered from antisocial personality disorder, Brogna did not contact the psychologist to discuss this diagnosis, nor did he attempt to have another psychologist or psychiatrist evaluate Lambright. He likewise failed to hire an independent investigator, despite his awareness that the court would pay for these additional expenses.

[6] Brogna also knew that Lambright had a serious drug problem, but he conducted no investigation with regard to the extent of his drug use or its effect on his general mental state or behavior. He likewise did not seek to obtain Lambright's school or military records.

Nor did he contact either of Lambright's former wives. Although Brogna traveled with counsel for Lambright's co-defendant to Texas and Louisiana for five days and spoke with a number of potential witnesses prior to the guilt phase of Lambright's trial, the trip did not yield any useful mitigating evidence, and Brogna did no additional investigating thereafter. Moreover it is unclear whether any of the individuals he spoke with during this trip were people he viewed as potential penalty phase witnesses. When Brogna spoke to Lambright's sister, he primarily asked her about Lambright's conduct around the time of the crime and does not appear to have asked her about Lambright's upbringing, his mental health, or other potential mitigating evidence.[3] Accordingly, as in *Correll*, Brogna's investigation of potentially mitigating

---

[3] At one point in its order, the district court concludes that "Brogna interviewed Petitioner's only sibling extensively[.]" The record does not support the court's finding that the interview was "extensive." Brogna testified that his recollection of his sole interview with Lambright's sister was "very vague[]," that the interview focused on Lambright's life shortly before and after the crime, and that he doesn't recall whether he talked with her about Lambright's upbringing, social history, or mental health problems. Lambright's sister's testimony about this interview is inconsistent, most likely due to the fact that she suffers from memory problems as the results of a stroke. Thus, we cannot accept the district court's finding that this interview was "extensive." In any event, this finding does not affect our decision. Even if counsel had spoken to Lambright's sister about his childhood, history of drug abuse, and mental health problems prior to the guilt phase of Lambright's trial, his total failure to do any other investigating or to follow up on what he might have learned from her, as well as his failure to present evidence of any of these mitigating circumstances to the sentencing judge, would render his assistance ineffective.

evidence was utterly deficient under the standards established by this court and by the Supreme Court.

In light of his woefully inadequate investigation, it is not surprising that Brogna's presentation at the sentencing proceeding was minimal and markedly uncompelling. He spent only five and a half hours obtaining evidence and preparing for the penalty phase. The sum total of the mitigating evidence that Brogna offered at sentencing required less than three pages of a double-spaced transcript and relates only to Lambright's behavior in jail. Although there were signs at the time that Lambright suffered from mental illness, his counsel failed to present any mitigating psychiatric testimony. Instead, in contravention of his obligation to his client, he relied solely on the probation officer's report and that of the court-appointed psychologist to present any mitigating evidence regarding Lambright's mental condition, history of drug dependency, and disadvantaged childhood. *Cf. Correll*, 465 F.3d at 1012. Brogna failed to call any of Lambright's family members or friends to testify about his abusive childhood, his history of mental instability, his suicide attempts, or his drug use. Nor was any testimony offered to humanize Lambright, or to situate the crime within Lambright's troubled history. Instead, Brogna promised the court that he had "one witness who will be very brief." This sole witness, a guard at the Pima County Jail, testified that while Lambright was incarcerated the guard had experienced no "problems with him" and that Lambright had "been respectful, courteous, and cooperative." Aside from this brief testimony, no mitigating evidence was introduced by Brogna. Instead, he submitted a two-

and-a-half-page memorandum listing various potentially mitigating circumstances, including (1) the fact that a deal was cut with Lambright's accomplice, Kathy Foreman, (2) Lambright's "lack of a prior violent criminal record," (3) "the Defendant's record while incarcerated," (4) that Lambright "is amenable to some type of treatment," (5) the fact that his "military record is a good one, and (6) that "[t]here is no record indicating he was a 'juvenile delinquent.'" However, none of the potentially mitigating circumstances discussed in the memorandum was described in any detail, nor did Brogna point to any evidence in the record or provide any factual support for his assertions. *Cf. Correll*, 465 F.3d at 1013 (noting that no evidence was offered to support the assertions made in trial counsel's brief sentencing memorandum).

Counsel's argument at the close of the sentencing proceeding was similarly brief and uncompelling. Brogna merely asked the court to consider the fact that Kathy Foreman, a willing participant in the crime, received no punishment, that "[t]here isn't anything in Mr. Lambright's background that establishes the fact that he is a sociopathic personality," and that Lambright did not have a violent history. He did not even mention Lambright's unfortunate childhood, his history of substance abuse, or the mental problems that led him to two suicide attempts, a bizarre episode in which he wielded a butcher knife outside his sister's door, as well as psychiatric hospitalization. Brogna did not ask for leniency or mercy; instead, he merely requested, without any elucidation, that the court impose a sentence of life in prison. Accordingly, Brogna's presentation at the penalty phase of

Lambright's trial, like his mitigation investigation, fell far below the level of representation to which Lambright was entitled under the Sixth Amendment. *Cf. Correll*, 465 F.3d at 1013; *Stankewitz*, 365 F.3d at 716-17 (finding ineffective assistance where counsel offered the very general and uncompelling testimony of six witnesses, and merely summarized briefly petitioner's life history "focus[ing] little on the actual details of [his] life" during closing argument).

The state argues, and the district court held, that Brogna's performance was not deficient because his brief memorandum, along with the pre-sentence report and the report of the court's mental health expert, Dr. Hinton, informed the sentencing judge that Lambright experienced a "bleak" childhood, that he had a history of drug abuse, and that he experienced mental health problems. Specifically, the district court held that Brogna did not perform deficiently because he

> referenced, albeit in abbreviated form, many of the same mitigating factors identified in these proceedings . . . Other factors [not mentioned by Brogna,] such as [cursory references to] the suicide attempts, hospitalization and abuse of drugs[,] were already before the sentencing judge and were considered in the weighing process. The Court therefore concludes that Brogna's presentation was not constitutionally deficient.

The district court's holding contravenes long-established Ninth Circuit law. As this court has often made clear, counsel's duty to investigate all potentially

mitigating evidence related to a defendant's mental health, family background, and prior drug use and to provide the sentencing court with a full presentation of the evidence that might lead the sentencer to spare his client's life is not discharged merely by conducting a limited investigation of these issues or by providing the sentencing court with a cursory or "abbreviated" presentation of potentially mitigating factors. *Stankewitz*, 365 F.3d at 716 ("[C]ounsel's duty to conduct a thorough investigation . . . is not discharged merely by presenting some limited evidence."); *see also Wiggins*, 539 U.S. at 524 (finding ineffective assistance and prejudice where "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources"); *Correll*, 465 F.3d at 1015 n.5 (holding that although "the bare facts of [petitioners]'s troubled past were . . . presented to the court, without further investigation and presentation of contextual evidence and argument, such facts served only to demonize [petitioner] rather than to mitigate the appropriateness of imposing the death penalty for his actions."); Douglas, 316 F.3d at 1090 (finding ineffective assistance where trial counsel "introduced some of [the defendant's] social history, [but] did so in a cursory manner that was not particularly useful or compelling."). To the contrary, "[w]hen it comes to the penalty phase of a capital trial, '[i]t is imperative that all relevant mitigation information be unearthed for consideration.'" *Douglas*, 316 F.3d at 1088 (quoting *Caro v. Calderon*, 165 F.3d at 1227). Only after a thorough investigation can a less than complete presentation of mitigating evidence ever be deemed reasonable, and only to the extent that a reasonable

strategy supports such a presentation. *Wiggins*, 539 U.S. at 527-28; *Stankewitz*, 365 F.3d at 719. Counsel may not rely for the development and presentation of mitigating evidence on the probation officer and a court appointed psychologist. *See Correll*, 465 F.3d at 1012 (finding "critical error" in counsel's decision to allow the trial judge to make a sentencing determination based on the state's evidence and the pre-sentence report). The responsibility to afford effective representation is not delegable to parties who have no obligation to protect or further the interests of the defendant.

[7] In sum, the record makes plain that Brogna's limited, cursory, and incomplete presentation of mitigating evidence did not take place after "'all relevant mitigation information [was] unearthed for consideration,'" *Douglas*, 316 F.3d at 1088 (quoting *Caro v. Calderon*, 165 F.3d at 1227). Instead, Brogna spent only five and a half hours, following Lambright's conviction, in preparation for the penalty phase (including three hours talking to the probation officer, preparing his subpoena for the jail guard, and dictating the memo to the court). Meanwhile, he ignored "tantalizing indications in the record . . . that 'would [have] le[]d a reasonable attorney to investigate further.'" *Stankewitz*, 365 F.3d at 720 (quoting *Wiggins*, 539 U.S. at 527). Compounding his failure to investigate, Brogna then failed to draw the court's attention to the scant mitigating evidence that was before the court through the pre-sentence report and Dr. Hinton's report, or to argue that this evidence should be given mitigating weight. Such representation falls far below that which any

reasonably competent attorney would provide in a capital case. Accordingly, we hold that the district court erred in concluding that Brogna's performance at the penalty phase was not deficient.

B. *Prejudice*

To establish prejudice, Lambright must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is one "'sufficient to undermine confidence in the outcome,'" but is "less than the preponderance more-likely-than-not standard." *Summerlin*, 427 F.3d at 640, 643 (quoting and citing *Strickland*, 466 U.S. at 693-94). Accordingly, "[i]n establishing prejudice under *Strickland*, it is not necessary for the habeas petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances." *Correll*, 465 F.3d at 1018 (citing *Williams v. Taylor*, 529 U.S. 362, 398 (2000)); *see also Rompilla v. Beard*, 545 U.S. 374, 393 (2005) ("[A]lthough we suppose it is possible that [the sentencer] could have heard it all and still decided on the death penalty, that is not the test."). Instead, in evaluating prejudice, we must "compare the evidence that actually was presented to the [sentencer] with the evidence that might have been presented had counsel acted differently," *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995), and evaluate whether the difference between what was presented and what could have been presented is sufficient to "undermine confidence in the outcome" of the proceeding, *Strickland*, 466 U.S.

at 694.

[8] Applying these standards, both this court and the Supreme Court have consistently held that counsel's failure to present readily available evidence of childhood abuse, mental illness, and drug addiction is sufficient to undermine confidence in the result of a sentencing proceeding, and thereby to render counsel's performance prejudicial. *See, e.g., Rompilla*, 545 U.S. at 390-91; *Ainsworth v. Woodford*, 268 F.3d 868, 878 (9th Cir. 2001); *Smith v. Stewart*, 140 F.3d at 1271.

In *Smith v. Stewart*, we held that prejudice had been established where defense counsel did very little investigating, presented no mitigating evidence, and made only "a few asthenic comments" on his client's behalf in spite of the fact that additional mitigating evidence "was rather near the surface." *Smith v. Stewart*, 140 F.3d at 1271. Smith was convicted of shooting a convenience store clerk while in the process of robbing the store, and the state sought the death penalty. *Id.* at 1267-68. In preparation for sentencing, Smith's counsel spoke with Smith and Smith's mother. *Id.* at 1269. He asked them "about [Smith's] growing up years, but did not discover any difficulties worth mentioning, and does not recall having been made aware of any treatment Smith might have received at a medical facility," most likely because he "asked nothing more than a few generalized questions and conducted none of the real probing for information that legal praxis assumes and even demands." *Id.* In light of the evidence Smith presented in support of his habeas petition, we noted that "counsel could have, at least, pointed to Smith's sociopathic personality, his bad drug

history, his change in personality after a large drug overdose, and his fine set of family relationships at the time" as evidence in mitigation. *Id.*

In assessing prejudice, the court noted that the fact that Smith had a sociopathic personality is mitigating, given that "[t]he Arizona Supreme Court has made it clear that an anti-social personality disorder (sociopathic disorder) is a mitigating factor, even if it does not come up to the level of a factor specifically listed in the Arizona sentencing statute." *Id.* at 1270 (citing *State v. Thornton*, 929 P.2d 676, 685-86 (Ariz. 1996) and *State v. Stokley*, 898 P.2d 454, 470-71, 473 (Ariz. 1995)).

> Similarly, Smith's long use of drugs is a factor that could have had a mitigating effect. . . . Along the same line, a major personality change can amount to a mitigating factor in Arizona. Smith has presented some evidence that a change of that nature came over him after he had ingested a large amount of PCP in 1980. . . . Finally, Smith points to his good family relationships. That was before the sentencing judge through the presentence report, but in a very mild form. With a little effort it could have been developed through evidence or argument, and could have put Smith himself in a somewhat different light.

Id. at 1271 (citing *State v. Gallegos*, 870 P.2d 1097, 1113 (Ariz. 1994); *State v. Rockwell*, 775 P.2d 1069, 1079-80 (Ariz. 1989)). Assessing this evidence, we noted that

> these factors, even as now developed, do not demand a life sentence rather than a sentence of death. On the other hand, while the facts of this case are bad enough to disturb even a jaded observer, they do not reach the level of those in cases where the aggravating facts were so overwhelmingly horrifying that it was highly improbable that mitigating factors of any ordinary stripe would help. . . . In fine, and with all due respect to those who have heard this case before us, our confidence in the sentencing result has been undermined.

Id. (citations omitted).

Here, as in *Smith*, significant mitigating evidence was available but was never developed or presented to the sentencing judge. Here, too, there was some limited and unsubstantiated mitigating evidence before the court through the pre-sentence report and Dr. Hinton's report, but counsel failed to develop it or even argue that the court should consider it. Indeed, the evidence that could have been presented or relied upon at Lambright's sentencing hearing is strikingly similar to the evidence the absence of which undermined our confidence in the outcome of the sentencing proceeding at issue in *Smith*. Specifically, the failure to offer the following evidence that could and should have been developed and presented was prejudicial.

1. *Lambright's Traumatic Childhood*

[9] The district court found that facts related to Lambright's childhood "w[ere] largely identified to the sentencing judge," and based on that finding concluded that Brogna's failure to develop this evidence was not prejudicial. This finding is clearly erroneous, that the resulting conclusion lacks support. While the pre-sentence report and Dr. Hinton's report did provide some very limited information about Lambright's upbringing, the picture of his childhood presented in the reports was inaccurate, undeveloped, and unsubstantiated. Had Brogna conducted a reasonable investigation, he would have been able to present compelling evidence showing that Lambright was subjected to near constant emotional and physical abuse by his mother throughout his childhood, and that his father did nothing to stop this abuse. Specifically, testimony could have been offered to show that his mother frequently hit, kicked, or whipped him, and that these beatings were a daily occurrence during extended periods of his childhood. Although the sentencing court may have been aware that Lambright's mother was "very strict" and was "ill-equipped with the necessary parenting skills" to raise two children, given that these facts were briefly mentioned in the pre-sentence report, no evidence regarding the significant physical abuse Lambright experienced as a child was developed or presented to the sentencing court.

Similarly, although the pre-sentence report noted that Lambright's mother was hypochondriacal and strictly Pentecostal, it did not convey the fact that she

spent the majority of Lambright's childhood in bed claiming to be afflicted by various illnesses, nor that she was profoundly addicted to prescription drugs. The sentencing judge was also unaware of the fact that Lambright's mother forced him to take Valium and sleeping pills when he acted up or had too much energy.

Although the pre-sentence report and Dr. Hinton's report noted that Lambright's family moved frequently during his childhood, these reports did not effectively convey the extent to which these moves prevented Lambright from developing stable social relationships as a young child – relationships that might have mitigated the effect of his abusive home environment. The court was also unaware that Lambright never attended any school for more than a year and, as a result, had difficulty forming friendships with other children and was a frequent target of schoolyard bullies.

The sentencing judge was likewise unaware of the poverty that Lambright experienced while growing up. In the pre-sentence report, the probation officer noted that according to Lambright and his older sister, they were raised in a lower-middle class family. The sentencing judge did not know that their constant moves were necessitated by their father's struggle to maintain steady employment, and that the family once was forced to move into a rat-infested house in which the walls and ceilings were lined with cardboard to block holes. He likewise did not know that they often lived in houses with no running water or indoor plumbing.

[10] Accordingly, Lambright has demonstrated that compelling mitigating evidence could and should have been presented regarding his childhood, evidence that, at least in combination with the evidence that Brogna failed to present regarding Lambright's long-term drug abuse and impaired mental condition, undermines our confidence in the results. Such failure was, accordingly, prejudicial.

2. *Lambright's Long-Term Drug Use and Dependency*

The district court concluded that "the sentencing judge was already well aware of [Lambright's history of drug abuse] through the pre-sentence report. There was not much more evidence that Brogna could have uncovered that would have been helpful or that the sentencing judge did not already know with respect to [Lambright's] drug use." This conclusion is likewise clearly erroneous in light of the evidence presented at the evidentiary hearing. Although the pre-sentence report and Dr. Hinton's report did mention Lambright's drug use, together the reports contained only a few sentences on this point, and provided incomplete, uncompelling, and uncorroborated information. Neither report contained any information about the extent to which these drugs affected Lambright's development or his social relationships, nor the nature of their effect on him. Had Brogna properly developed evidence regarding Lambright's long history of drug dependency, he would have been able to show that drug and alcohol abuse were rampant in Lambright's family and that, as noted above, it was his mother who first

exposed him to drug abuse by forcing him to take sedatives when he was a child. Brogna could have presented further evidence regarding the fact that there were periods in Lambright's life during which he took large quantities of methamphetamine, staying awake for weeks at a time. He could have presented evidence about the negative impact drug abuse had on his ability to form relationships, and could have provided expert testimony about the long-term psychological impact on him of his extreme methamphetamine abuse. At the evidentiary hearing, even the state's expert, Dr Lang, diagnosed Lambright with profound substance dependency.

[11] Accordingly, significant evidence related to Lambright's long-term drug addiction and its effect upon him was available but was not presented to or urged upon the sentencing court, evidence which, in combination with the evidence Brogna failed to introduce regarding Lambright's childhood and his mental health problems, undermines our confidence in the result. The failure to present such evidence was, accordingly, prejudicial.

3. *Lambright's Mental Health Problems*

The district court found that Lambright's "testimony with respect to the trauma underlying his expert's PTSD diagnosis (the alleged combat experience) is less than credible." On the basis of the testimony and other evidence offered at the evidentiary hearing, we

conclude that this finding is not clearly erroneous.[4] However, because it considered only the question whether Lambright had proved that he suffered from PTSD, the district court failed to discuss evidence establishing that Lambright did suffer from various other mental health problems. Moreover, irrespective of whether Lambright suffered a traumatic combat experience in Vietnam, there was testimony presented at the evidentiary hearing that he was a very different person once he returned from his tour of duty. *Cf. Smith v. Stewart*, 140 F.3d at 1271 ("[A] major personality change can amount to a mitigating factor in Arizona.").

In addition, testimony at the evidentiary hearing described Lambright's lifelong struggle with depression. Dr. Morenz, Lambright's mental health expert, testified that Lambright has experienced varying levels of depression for most of his life, and at times has suffered from "major depression." Even Dr. Lang, the state's expert, diagnosed him with a depressive disorder. As a result of his profound depression, Lambright twice attempted suicide. Moreover, on at least one occasion, Lambright experienced hallucinations and was hospitalized as a result.

---

[4] The district court erred, however, in declaring that even if it were "persuaded that the Petitioner suffered from PTSD, Petitioner has failed to show how the disorder affected his criminal conduct." As we explained *supra* at Part II, there need not be a causal connection between a factor, such as mental illness, disturbed childhood, or drug dependency, and the criminal offense in order for it to be mitigating.

Expert testimony presented at the evidentiary hearing also suggested that Lambright may suffer from a personality disorder. Dr. Lang, the state's expert, whose assessment of Lambright's mental health problems the district court found credible, concluded that Lambright suffers from a personality disorder not otherwise specified with antisocial, borderline, and inadequate features. This diagnosis, if properly developed and explained to the sentencer, would have had a mitigating effect under Arizona law, as noted in *Smith v. Stewart*, 140 F.3d at 1270 (citing *Thornton*, 929 P.2d at 685-86; *Stokley*, 898 P.2d at 470-71, 473).

[12] While the sentencing court was provided with some limited information about Lambright's mental health problems through the pre-sentence report and Dr. Hinton's report, the information contained in those reports was conclusory and based solely on Lambright's own accounts of his history. No medical records were offered to substantiate his reports of suicide attempts or psychiatric hospitalization, and no mental health professional was called to testify about the extent and nature of his mental health problems. Thus, while certain basic information about Lambright's mental health problems was presented to the sentencing judge, this information was incomplete, not compellingly presented, and buried in otherwise damning reports.

Moreover, because Brogna apparently failed to recognize that Dr. Hinton's diagnosis of antisocial personality disorder is a mitigating factor under Arizona law, *see Smith v. Stewart*, 140 F.3d at 1270, he

never urged the sentencing judge to give this diagnosis mitigating weight. Indeed, Brogna never argued that the scant mental health evidence that was before the court should be considered in mitigation, Instead, he suggested that Lambright did not suffer from the mental health problem diagnosed by Dr. Hinton.

Brogna's failure to identify the minimal mitigating evidence in the record and to urge it in mitigation likewise applies to Lambright's disturbed childhood and his history of drug abuse. Brogna never pointed out to the sentencing judge that either of these conditions constituted mitigating factors, never urged that the judge treat them as such, and never explained the weight that should be given them.

We do not underestimate the importance of the role of counsel in the adversarial process. The sentencing judge cannot be expected to comb the record looking for mitigating factors, particularly where the minimal evidence that exists is buried in reports that are on the whole strongly unfavorable to the defendant. When a defense lawyer fails to identify crucial mitigating factors and fails to explain why those factors should affect the judge's decision, that failure alone may, in some instances, be prejudicial. To the extent that the state argues that the minimal mitigating information that was before the court principally as a result of the submissions of the pre-sentence report and Dr. Hinton's report defeats Lambright's claim of prejudice, we rejected that argument in *Correll*. There, we held that

> [w]hile the bare facts of Correll's troubled past were indeed presented to the court [through the presentence report and defense counsel's brief sentencing memorandum], without further investigation and presentation of contextual evidence and argument, such facts served only to demonize Correll rather than to mitigate the appropriateness of the death penalty for his actions.

Correll, 465 F.3d at 1015 n.5.

[13] In sum, there is a significant quantity of "classic" mitigating evidence that was never presented or urged upon the sentencing judge on account of Brogna's failure to adequately investigate and prepare Lambright's sentencing defense. Had counsel conducted a reasonable investigation with respect to Lambright's childhood, mental health, and history of drug abuse, had he effectively presented the information he would have uncovered, and had he then made the appropriate arguments to the sentencing judge, there is a reasonable probability that the result of the sentencing proceeding would have been different; put plainly, Brogna's failure to provide effective assistance of counsel undermines our confidence in the result.

[14] The prejudicial nature of Brogna's failure to develop and adequately present available mitigating evidence becomes particularly "apparent when we consider the effect of the error under Arizona law. At the time of the penalty phase proceedings, Arizona law mandated the death penalty [where one or more

aggravating factors were present] . . . if there was no mitigating evidence. . . . Thus, [a lawyer's] failure to present any evidence in mitigation [would] 'all but assure[] the imposition of a death sentence under Arizona law.'" *Id.* at 1012 (quoting *Summerlin*, 427 F.3d at 640); *see also Smith v. Stewart*, 140 F.3d at 1268, 1270 (stating that, in light of Arizona's statute, counsel's "few asthenic comments" at sentencing amounted to a "virtual admission that the death penalty should be imposed upon his client").

[15] The effect of Arizona's death penalty statute is particularly striking in the case at hand given the sentencing judge's statements at the hearing in which he announced his penalty verdict. In sentencing Lambright to death, the sentencing judge state that

> the very factors which make murder a terrible crime make the death penalty a terrible punishment.
>
> THE COURT has been asked if "justice" requires the maximum penalty; the question is answered by quoting the statute[:] ". . . The Court . . . *shall* impose a sentence of death if it finds one or more aggravating circumstances and finds no mitigating circumstances sufficiently substantial to call for leniency."
>
> THE COURT HAS SO FOUND, and the LAW demands the maximum penalty . . .

(emphasis in original). Thus, the sentencing judge's own statements make clear that, given Brogna's failure

to present any significant mitigating evidence, the judge felt legally compelled to impose the death penalty in this case. Had Brogna presented the mitigating evidence that would have been unearthed through a reasonable investigation of the mitigating circumstances, there is a reasonable probability that the result of the sentencing judge's penalty deliberations would have been different.

Finally, this is not a case in which there were a multitude of aggravating factors that Lambright would have had to overcome in order to receive a life sentence. To the contrary, the sole aggravating factor found by the sentencing judge was the fact that the crime here at issue was "committed in an especially heinous, cruel, or depraved manner." As we noted in our opinion remanding this case for an evidentiary hearing,

> [w]e have previously found that the prejudice requirement is met where "defense counsel effectively presented no mitigating evidence at sentencing, despite the presence of aggravating factors." . . . [I]n this case the State argued that only one aggravating factor existed. Although the offense in this case certainly was brutal and sadistic, the Supreme Court in *Williams* recently noted that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." . . . Evidence of mental disabilities or a tragic childhood can affect a

> sentencing determination even in the most savage case.

Lambright III, 241 F.3d at 1208 (citations omitted).

We have held that, in light of the Supreme Court's decisions in *Wiggins* and *Williams v. Taylor*, it is clear that "the presentation of mitigating evidence is vital even where . . . the aggravating evidence is powerful." *Stankewitz*, 365 F.3d at 714. In *Ainsworth*, for example, where we held that counsel's failure to present evidence very similar to that which should have been presented in Lambright's case was prejudicial, the offense was at least, if not more, vile than the offense at issue here. *Ainsworth*, 268 F.3d at 870-71. Ainsworth approached the victim as she sat in her parked car, and shot her in the left hip with a .45 caliber handgun. *Id.* at 870. The bullet passed through her pelvis and ledged against her right hip. *Id.* During the next twenty-four hours, Ainsworth confined the suffering victim within her car, ignored her pleas for help and, at one point, put her in the trunk because he was tired of hearing her moan and cry. *Id.* Then, after removing her from the trunk, he raped her. *Id.* Twenty-four hours after she was shot, the victim finally died and Ainsworth dumped her body and abandoned her car. *Id.* at 871. In spite of the savageness of this offense, and in spite of other significant aggravating factors present in that case, we held that Ainsworth's counsel's failure to introduce available mitigating evidence regarding "Ainsworth's troubled childhood, history of substance abuse, and mental and emotional problems" was prejudicial. *Id.* at 875, 878.

[16] Indeed, we have held consistently that even in cases involving particularly heinous murders, a defendant can be prejudiced by an attorney's failure to investigate and present mitigating evidence. *See Hovey v. Ayers*, 458 F.3d 892, 930 (9th Cir. 2006) (noting that even where a defendant has been convicted of horrible crimes, a sentencer may still choose to impose a life sentence when confronted with mitigating evidence); *Douglas*, 316 F.3d at 1091 (finding that "[t]he gruesome nature of the killing did not necessarily mean that the death penalty was unavoidable."); *Smith v. Stewart*, 189 F.3d at 1013 ("[T]he horrific nature of the crimes involved here does not cause us to find an absence of prejudice."); *Hendricks v. Calderon*, 70 F.3d 1032, 1044 (9th Cir. 1995) (concluding that "despite . . . substantial evidence of aggravation, . . . the failure . . . to present mitigating evidence rendered the sentencing hearing neither fair nor reliable").

In sum, Brogna's failure to conduct a thorough investigation of all potentially mitigating evidence was unreasonable, especially in light of the information available to him, and fell far below standards of professional conduct. Because the evidence counsel failed to uncover and present to the sentencing judge was highly significant, because there was but one factor in aggravation in this case, and because Brogna's failures were particularly prejudicial in light of Arizona law, Lambright has adequately "undermined [our] confidence in the outcome" of the penalty phase. *See Strickland*, 466 U.S. at 694. For these reasons, we hold that the district court erred in finding that Lambright

was not prejudiced by Brogna's ineffective representation.

CONCLUSION

The district court erred in concluding that Lambright did not receive ineffective assistance of counsel at the penalty phase of his trial and further erred in holding that, even if he did, he suffered no prejudice as a result. The sentence imposed is vacated. Further sentencing by the state court shall be conducted in conformance with applicable law.

REVERSED and REMANDED for issuance of a writ of habeas corpus.

FERGUSON, Circuit Judge, concurring:

I.

I concur in the per curiam opinion. I write separately to focus on the district court's erroneous rejection of Lambright's Post Traumatic Stress Disorder (PTSD) claim.

II.

War is hell. Not only for the soldier who fights on the front lines, but also for the military ambulance driver who must rescue the wounded, the mess hall cook whose friends are killed on the battlefield, the civilian who loses a loved one, and the augmentee who, like Lambright, runs patrol missions at an Air Force

base in a war-plagued country. Any member of the military exposed to trauma may suffer from PTSD, regardless of whether he or she served on the front lines or exchanged gunfire with the "enemy."[1] *See* Kathleen A. Tarr, *Above and Beyond: Veterans Disabled by Military Service*, 5 Geo. J. Fighting Poverty 39, 43 (1997) (recognizing "the simple fact that almost anyone who serve[s] during wartime [is] exposed to stress capable of causing mental disability" and "that *most* service-members' wartime experiences [are] horrific and potentially disabling, even if not uncommon").

Lambright claimed to have been involved in combat at the Phu Cat Airbase in Vietnam while serving as an augmentee. He testified that Viet Cong soldiers ambushed him and a friend while they were performing police duties. Lambright claimed that his friend died in his arms after being shot in the stomach.

The district court found that Lambright's "testimony with respect to the trauma underlying his expert's PTSD diagnosis (the alleged combat experience) [was] less than credible." While this finding is not clearly erroneous, given the extensive evidence casting doubt on the specifics of Lambright's story, the district court

---

[1] Of course, PTSD also occurs outside of the context of war. It can be triggered by anything from domestic violence, *see e.g.*, M.C. Austin et al., *Posttraumatic Stress Disorder Among Battered Women: Risk and Resiliency Factors*, 8 Violence & Victims 17 (1993), to animal abuse, *see, e.g.*, Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. of Animal L. and Ethics 63 (2006).

did err in concluding that Lambright therefore did not suffer from PTSD. Although Lambright's psychiatrist relied on the combat story in diagnosing Lambright with PTSD, he also testified that Lambright's general Vietnam experience could have triggered the disorder and that "merely being in a base where there was mortar fire and considerable danger is also potentially enough to satisfy this diagnosis."

There is no question that Lambright came home from Vietnam a changed man. His first wife testified that before his deployment to Vietnam, Lambright "was a kind person, gentle, free-hearted," but that he returned troubled and disturbed. Lambright "wasn't like the same person. . . . [H]e didn't have a calm nature about him. . . . [H]e wasn't a happy person." He had difficulty sleeping and suffered from frequent combat nightmares, including one incident in which he grabbed his wife and told he to get down because the Viet Cong was hiding in the bushes. Lambright often wished himself dead, and on one occasion he drove his car into a tree in an attempt to kill himself.

Lambright's sister also observed a significant change after Lambright returned from Vietnam. She stated, "[B]efore he went to Viet Nam[,] Joe was kind, gentle, and well-behaved. When he got back from his service in Viet Nam he was completely changed. He was extremely tense, paranoid, and nervous." She once discovered him on her porch, "cowering against a wall [and] swinging a butcher knife," and hallucinating about an "imaginary attack by someone or something."

Given the horrors of even the most mundane aspects

of the Vietnam war, *see generally*, Michael Herr, Dispatches (1977), coupled with Lambright's marked postwar change in personality and his exhibition of PTSD symptoms, it is quite likely that Lambright was exposed to some trauma in Vietnam that triggered PTSD, even if his Phu Cat Air Base story was a figment of his imagination.

III.

The district court, having concluded that Lambright's war story was fabricated, should have then determined whether Lambright's Vietnam experience exposed him to any non-combat stressors sufficient to induce PTSD. Were we not reversing on other grounds, I believe the district court's erroneous assumptions about PTSD would necessitate a remand for such a determination.

APPENDIX B

___FILED ___LODGED
_____RECEIVED _____COPY

AUG 30 2004
CLERK OF US DISTRICT COURT
DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOE LEONARD LAMBRIGHT,	) No. CIV-87-235-
	) TUC-JMR
Petitioner,	)
vs.	) DEATH
	) PENALTY CASE
	)
DORA B. SCHRIRO, ET AL., [1]	) MEMORANDUM
	) OF DECISION
	) AND ORDER
Respondents.	)
	)

In Lambright v. Stewart, 241 F. 3d 1201 (9th Cir. 2001), a panel of the Ninth Circuit Court of Appeals remanded this matter for an evidentiary hearing and determination of whether Petitioner Joe Leonard Lambright's trial counsel rendered ineffective

[1] Dora B. Schriro is substituted for her predecessor, Terry Stewart, as Director, Arizona Department of Correction. Fed. R. Civ. P. 25(d)(1)

assistance of counsel during the capital sentencing phase of his case. In November 2003, this Court conducted a 6-day evidentiary hearing; the parties submitted proposed findings of fact and conclusions of law in February 2004. For the reasons set forth below, the Court finds that Petitioner did not carry his burden of proof on the claim of ineffective assistance of counsel at sentencing. Accordingly, Petitioner is not entitled to habeas relief.

PROCEDURAL BACKGROUND

Petitioner was convicted by a jury in Pima County Superior Court of first degree murder, kidnapping and sexual assault. Petitioner's case, and that of co-defendant Robert Douglas Smith, were severed for trial but tried simultaneously to dual juries. Smith was convicted by his jury of the same crimes. A third participant in the office, Kathy Foreman, was not charged and received immunity in exchange for her testimony.

On direct appeal, the Arizona Supreme Court affirmed Petitioner's convictions and sentences. State v. Lambright, 138 Ariz. 63, 673 P.2d 1 (1983), cert. denied, 469 U.S. 892 (1984). Petitioner then sought post-conviction relief under Rule 32 of the Arizona Rules of Criminal Procedure, arguing *inter alia* that the trial counsel provided ineffective assistance at sentencing. The state court dismissed the claim as precluded on the ground it could have been raised on direct appeal. See Ariz. R. Crim. P. 32.2(a)(3). The Arizona Supreme Court summarily denied review on July 9, 1986.

On April 14, 1987, Petitioner filed his initial petition for habeas corpus relief pursuant to 28 U.S.C.

§ 2254 in this Court. Respondents moved for dismissal for failure to exhaust state court remedies, and dismissal was granted without prejudice. The Court maintained jurisdiction over the case while Petitioner again sought post-conviction relief in state court, which was denied. The Arizona Supreme Court again summarily denied review of the post-conviction proceedings. On February 23, 1995, Petitioner filed an amended petition for writ of habeas corpus in this Court.

In the amended petition, Petitioner alleged ineffective assistance of counsel at trial and sentencing and various other claims, including an argument that the dual-jury procedure employed during trial was impermissible. On July 9, 1996, this Court denied habeas relief. Lambright v. Lewis, 932 F. Supp. 1547 (D. Ariz. 1996). With respect to the claim of sentencing counsel's ineffectiveness, the Court found that the claim had been procedurally defaulted in state court. Id. at 1560.

On appeal, a panel of the Ninth Circuit reversed this Court's denial of habeas relief, ruling that the dual-jury procedure violated Petitioner's Fourteenth Amendment rights, the error was structural and reversal of convictions was required. Lambright v. Stewart, 167 F.3d 477 (9th Cir. 1999). The Ninth Circuit granted a petition for review en banc, Lambright v. Stewart, 177 F.3d 901 (9th Cir. 1999), and the en banc court affirmed this Court's ruling regarding dual juries and returned the matter to the three-judge panel for a ruling on other claims, Lambright v. Stewart, 191 F.3d 1181 (9th Cir. 1999) (en banc). The original panel authorized a certificate of appealability on certain issues. Lambright v. Stewart, 220 F.3d 1022 (9th Cir. 2000). Subsequently,

on March 26, 2001, the panel ruled that Petitioner's penalty phase ineffectiveness claim was not procedurally barred and that Petitioner was entitled to an evidentiary hearing. Lambright v. Stewart, 241 F.3d 1201 (9th Cir. 2001), cert. denied, 534 U.S. 1118 (2002). The court denied relief on the remaining claims in an unpublished memorandum decision.

FACTURAL BACKGROUND

In early 1980, Petitioner, co-defendant Smith, and Foreman embarked on a cross-country drive from Texas. (RT 3/25/82 at 694.)[2] During this trip, Petitioner and Foreman repeatedly has sex in front of Smith. One evening while camped outside Tucson, Smith complained about not having a partner. The next morning the three drove into Tucson and went to a coffee shop; Smith again complained about not having a woman. Petitioner remarked that he "would like to kill somebody just to see if he could do it," and told Foreman they were going to find someone for Smith. (Id. at 698-99.)

While in Tucson, the group saw Sandra Owen hitchhiking. Owen was a 29-year-old woman with significant mental disabilities. (RT 3/27/82 at 1084.) She was a patient of a mental health center and was on medication. Owen shared an apartment with a roommate, but her parents supported her financially each week. (Id.)

Petitioner, Smith and Foreman picked up Owen. They engaged her in small talk and agreed to drive her to a food stamp office on the eastside of

---

[2] "RT" refers to Reporter's Transcript.

Tucson. When the group arrived at the office, Petitioner drove the car behind the building. He climbed into the backseat and told Owen "to shut up and be quiet and she wouldn't get hurt." (RT 3/25/82 at 703.) Owen asked what was happening and, according to Forman, looked frightened and appeared to be trembling. Smith drove the vehicle to the interstate, and Petitioner went through Owen's purse and found a bottle of prescription pills. When Petitioner asked about the medication, Owen told them she had just been released from a mental institution. (Id. at 706.)

As they drove, Owen asked if she could sing a song to calm herself, which she did. When Owen said she needed to use the bathroom, the car pulled to the side of the road. Petitioner told her to take off her shoes and told Foreman to catch Owen if she tried to run. (Id. 708.) When Owen and Foreman returned to the vehicle, Smith got into the backseat with Owen and Petitioner began to drive. Smith covered the windows in the back of the car and raped Owen. Afterward, Smith chuckled and complained to Owen that "she had small tits." (Id. at 712.) When Owen asked if they were going to release her, both Petitioner and Smith said they planned to take her back and let her go. (Id.)

About 50 miles outside of Tucson, near Casa Grande, the group left the interstate and followed paved and dirt roads until they could drive no further. They got out of the car and walked up the side of a mountain to a clearing. A fire was started, and Petitioner and Foreman had sex while Smith again raped Owen. (Id. at 713–16.)

Afterward, Petitioner told Foreman they could not let Owen go because she would press charges. (Id. at 718.) While Petitioner and Foreman were discussing Owen, Smith grabbed Owen's throat from behind and began to choke her. Petitioner grabbed Foreman's knife and went over to Owen and stabbed her in the chest or stomach a couple of times. (Id. at 720.) Smith fell to the ground with Owen and pinned one of her arms. Petitioner yelled for Foreman to grab her other and, while Owen's arms were held down by Foreman and Smith, Petitioner stabbed Owen repeatedly. (Id. at 721.) At one point, Petitioner "had the knife wallowing around inside of Owen," "[t]wisting and turning it inside of her." (Id.) After the stabbing, Smith unsuccessfully tried to break Owen's neck by twisting her head. Then Petitioner began sawing at Owen's neck with the knife. (Id. at 722.) When Owen managed to raise herself on one elbow, Petitioner threw a large rock at her head and yelled "Die, bitch." (Id. at 723.) Petitioner took Owen's jewelry, including a wedding ring, a small turquoise ring, a bracelet and a necklace, and then he and Smith covered her with rocks. (Id. at 724.)

The trio got back into the car and went to a liquor store to buy a Pepsi, then to a truck stop, where they sold some items for gas. (Id. at 725.) After they got back on the road, Smith asked for a tape by the musical group Queen and played the song, "*We Are the Champions.*" Petitioner and Smith smiled and laughed in the car. (Id. at 726.) Petitioner asked, "did you see what happened when I throwed [sic] the rock?" (Id. at 726-27.) The three continued to San Diego where Petitioner pawned Owen's wedding ring, signing the pawn slip. (RT 3/29/82 at 1118.) Three or four days after Owen's murder, the group returned to Texas. Foreman was told by Petitioner that if she told anyone, "the same thing would happen" to her. (RT

3/25/82 at 728.) Smith joined in, saying "and I'll help." (Id.)

In late 1980, Petitioner's ex-wife, Sylvia Abshire (Scott) contacted Louisiana law enforcement to report a murder. (Tr. Ex. 15 at 1.)[3] She relayed a story her ex-husband had told her concerning a blonde, medium-build female that he, Smith and Foreman had picked up in Tucson. (Id at 2.) Petitioner told her that the three took the woman into the mountains and raped and killed her. The woman had been stabbed, her throat cut, her head crushed with a rock and her body buried in a shallow grave. Abshire also relayed that Petitioner wore the victim's Star of David necklace as a "memento." (Id.) After learning of a missing women who fit the alleged victim's description, the police interviewed Foreman. (RT 3/25/82 at 751.) She still had one of Owen's rings, voluntarily relayed details of the murder and agreed to help Arizona law enforcement locate Owen's body. (Id. at 729, 755-56.)

For a nearly a week in March 1981, Foreman and a Pima County Sheriff's detective searched the desert near Casa Grande. (RT 3/27/07 at 1048-49.) Coincidentally, during this time, a hiker found human remains near Casa Grande in Pinal County. (Id. at 1022.) When the Pima County detective and Foreman went to the vicinity where the remains had been found two days earlier, it was an area very close to where they had searched. Once they arrived in the general location, Foreman led the detective to the scene of the murder. (Id. at 1051.)

---

[3] "Tr. Ex." Refers to exhibits from the state court trial and sentencing proceedings.

Dr. Walter Birkby, a forensic anthropologist at the University of Arizona, used dental records to identify the remains as those of Sandra Owen. (Id. at 1078-79.) The remains included a necklace and locket (id at 1080), which has been a gift to Owen from her mother (id at 1087.)

In addition to Dr. Birkby, Dr. Richard Froede, a forensic pathologist, examined the remains, which included skeletal pieces within parts of clothing. (RT 3/26/82 at 984; RT 3/27/82 at 1079-80.) Both experts found markings on the second and third cervical vertebrae, an area high up on the neck, that indicated use of a sharp instrument such as a knife. (RT 3/26/82 at 987-88, 995.) The object causing the markings passed through Owen's carotid artery and carotid vein and might have passed through the trachea and windpipe. Muscles dissected by the force included the anterior jugular and the external jugular. (Id. at 992-93.) No stab wounds were detectable in the rib cage or stomach area because those areas consist of soft tissue or cartilage that was missing as a result of the body's exposure to the elements for over a year. (Id. at 996-99.) An examination of the skull did not reveal a fracture. However, because no tissue remained, the pathologist could not rule out the possibility that Owen had been struck in the head. (Id. at 999-1000.)

When Petitioner was arrested on March 14, 1981, he was wearing Owen's Star of David necklace. (Id. at 901.) Petitioner confessed to picking up Owen when she was hitchhiking, seeing Smith repeatedly rape her, and seeing Smith choke her. (Id. at 940-41, 968-69.) He also confessed to seeing Foreman and Smith holding Owen's arms and seeing a knife stab Owen. (Id. at 941, 970.) However, Petitioner said he did not know who had done the stabbing and could not remember if Owen had been struck on the head with a

rock. Petitioner claimed his memory of the murder itself was "a little fuzzy and a little hazy." (Id. at 942.)

On April 20, 1982, following conviction and in preparation for sentencing, Petitioner was examined by Dr. Richard Hinton of the Court Clinic. Petitioner declined to discuss his involvement in the crimes (telling Dr. Hinton that he planned to appeal the verdict), but denied being a violent person. He did, however, admit to slapping his ex-wives on occasion. Dr. Hinton diagnosed an antisocial personality disorder and remarked that Petitioner exhibited very little remorse. (Ex. 10-d at 4.)[4] In his report, Dr. Hinton documented the following personal history obtained from Petitioner:

> Mr. Lambright was born in Orange, Texas. He described his early family life as being somewhat disrupted as a result of his father's employment, which required frequent family moves. According to the client, the family moved every six to nine months for his first ten years of life. As a result, he indicated that he never went to one school for longer [than] one year and that he never developed close friendships. Mr. Lambright described his mother as an extremely religious woman of the Pentecostal faith. He described his father as a man who "worked hard and steady." He has one sister who is three-and-a half years his senior. Mr. Lambright denies that he was abused by his parents.
>
> The client finished the ninth grade following which he was "kicked out" because he was attending school in a town in which his

[4] "Ex." refers to exhibits from this Court's November 30 2003 evidentiary hearing.

parents did not live. At age eighteen, he joined the Air Force. Shortly thereafter, he married his first wife. According to Mr. Lambright, his tenure in the Air Force was characterized by appropriate behavior and regular advancement in rank. In the Air Force, he obtained special training in jet engine mechanics. He indicated that during his tour of duty he spent several months in Vietnam during which time he was involved in combat. He also indicated that during the course of his military duty in Vietnam, he killed at least two Viet Cong soldiers in hand-to-hand combat.

Approximately three years after enlisting in the Air Force, Mr. Lambright received an honorable discharge under hardship conditions because his father was dying of emphysema. At that time, he returned to Orange, Texas, where he lived and worked with his father. Approximately one-and-one-half years later, his father died. According to Mr. Lambright, six months following the death of his father, he had a nervous breakdown which necessitated his brief admission to a psychiatric unit at the VA hospital in Houston, Texas. Approximately two months following his release from the VA hospital, he divorced his wife. Mr. Lambright indicated that he was discharged from the psychiatric hospital after only seventy-two hours of treatment, against medical advise [sic], because he felt he was not getting the help he needed there.

Shortly after the divorce from his first wife, Mr. Lambright met his second wife. He lived with her for four years before they were married. After five years of marriage, he divorced his second wife because, "I had too many girlfriends."

> According to Mr. Lambright, he has attempted suicide in the past on two occasions. Each of these attempts was associated with marital pressures. On one occasion he attempted suicide by taking an intentional overdose of Valium. On another occasion, he intentionally drove his car into a tree. Mr. Lambright indicates that he has a long history of drug abuse including marijuana, amphetamines, barbiturates, and cocaine.

(Id. at 2-3.)

Petitioner was also interviewed by a probation officer assigned to the case, who prepared a lengthy presentence report for the trial judge. As with Dr. Hinton, Petitioner declined to talk about the murder on the ground that his case was being appealed. He did say that Foreman had a larger role that she had portrayed during trial and claimed that it was Foreman, not he, who told his ex-wife about the murder. (Ex. 10-c at 3.) The probation officer also spoke to Petitioner's sister, Mildred Fontenot, to glean information about Petitioner's social history. In his report, the probation officer noted Petitioner's unstable upbringing by a "hypochondriacal, Pentecostal mother." (Id. at 4.) Petitioner relayed that at age 16, after his sister left home, he mother went through a significant change of attitude with respect to discipline and

> seemed to abdicate from her role as a parent, leaving the defendant to quit school and to do as he pleased. He soon began living a directionless existence, associating with older boys and not engaging in any productive activity. This went on for about a year before his mother and sister became so concerned

> that they convinced him to enter the Air Force, this being in October of 1965. He served four years before being granted an early discharge due to his father's ailing health. The defendant had married his first wife shortly after enlisting in the service, but after his discharge, he began experiencing mental health and marital problems that led to a divorce a year later.

(Id. at 5.)

With respect to mental health problems, the report states that Petitioner described having a breakdown after returning from Vietnam and experiencing generalized feelings of paranoia in conjunction with feelings of failure over his first marriage. (Id. at 6.) Petitioner said that although he was not supposed to be involved in combat during his stay in Vietnam, he was sent out on patrols occasionally and was involved in skirmishes with the Viet Cong. "During one such outing, he apparently saw two friends killed and thereafter refused to leave the base camp." (Id. at 8.)

The probation officer summed up his evaluation by commenting on Petitioner's transient history, tendency to avoid stress by running, and the "self-centered, hedonistic lifestyle he has chosen." (Id. at 9.) With respect to the murder, he observed: "it is difficult to imagine a more brutal, depraved, and senseless killing, and for the defendant to feel nothing in the way of guilt or remorse is so dramatically opposed to the general social conscience that it, too, is hard to imagine." (Id.)

At trial and sentencing, Petitioner was represented by Carmine Brogna. On April 26, 1982, during a pre-sentencing status conference Brogna

relayed to the trial court his intention to produce no mitigation witnesses and instead to submit a memorandum outlining mitigation points. (RT 4/26/82 at 1426.) On April 30, 1982, the court held an aggravation hearing. With regard to Petitioner, the State presented only the testimony of the lead detective to establish that the victim had been killed in an isolated location. On May 3, 1982, Brogna filed a two-and-one-half page mitigation memorandum, and the probation officer submitted his detailed presentence report to the trial judge. The memo listed the following factors in consideration of a sentence less that death: Foreman's immunity deal, lack of a prior violent criminal record, and pre-trial incarceration behavior, possibility of rehabilitation, good military record with service under combat conditions in Vietnam, non-repetitive nature of the offenses, and "relatively young" age with no criminal record despite his migratory lifestyle as a child. (Ex. 10-e.)

On May 12 and 14, 1982, the trial court held mitigation hearings for Smith and Petitioner, respectively. At Petitioner's hearing, Brogna produced only one brief witness: a Pima County Jail detention office who testified that, during six months of pre-trial incarceration, Petitioner caused no disciplinary problems and acted "respectful, courteous and cooperative." (RT 5/14/82 at 1478.) Brogna's argument against capital punishment focused on sentencing disparity between Petitioner and Foreman, lack of evidence to support Dr. Hinton's sociopathic personality diagnosis, and lack of violence in Petitioner's background; he did not appeal for leniency. The entire oral argument comprised only two and one-half transcript pages. (Id. at 1497-1500.)

Sentencing took place on May 27, 1982. The trial court found that Petitioner planned and

premeditated Owen's murder. (RT 5/27/82 at 1580, 1513.) The court further found, beyond a reasonable doubt, the existence of one aggravating factor: Petitioner committed the offense in an especially heinous, cruel and depraved manner. (id. at 1508.) A.R.S. § 13-703(F)(6) (West 1978). In mitigation, the court considered that Petitioner had no record of prior violent crime (but noted that Petitioner admitted hitting his ex-wives on occasion), had no disciplinary problems during pre-trial incarceration, had been honorably discharged from the military, and had experienced an "unsettled" family life as a child. The court also considered that co-conspirator Foreman had been given immunity from prosecution, but ultimately concluded that none of the mitigation was sufficient to call for leniency. (Id. at 1513-18.) The trial court therefore sentenced Petitioner to death pursuant to A.R.S. § 703(E) (West 1978).[5]

STANDARD OF REVIEW

Petitioner filed his habeas petition before enactment of the Antiterrorism and Effective Death Penalty Act of 1996. Accordingly, Petitioner's case is governed by the pre-AEDPA standards. See Lindh v. Murphy, 521 U.S. 320, 326 (1997). To prevail on a claim of ineffective assistance of counsel ("IAC"), Petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the

---

[5] In response to the Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), Arizona's legislature amended A.R.S. § 13-703 to provide for jury determination of aggravating factors as well as jury sentencing. In Schriro v. Summerlin, 124 S. Ct. 2519 (2004), the Supreme Court expressly held that Ring does not apply retroactively to cases, such as Petitioner's, whose direct appeals were final at the time Ring was decided.

defense. Strickland v. Washington, 466 U.S. 668 (1984).

A. Deficient Performance

To show deficient performance, a petitioner must produce evidence that "counsel's representation fell below an objective standard of reasonableness." Id at 688. The performance inquiry is whether counsel's assistance was reasonable considering all the circumstances. Id. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. For instance, counsel's performance is evaluated by what reasonable counsel would have done at the time, including an evaluation of state law sentencing strategies. See Siripongs v. Calderon, 35 F.3d 1308, 1315 (9th Cir. 1994) (stating that under California law, a defendant may provide evidence of "residual doubt" as to his guilt during the penalty phase). Petitioner must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. Strickland, 466 U.S. at 689. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690. Less than complete investigations may form the basis for strategic choices, so long as "reasonable professional judgments support the limitations on investigation." Wiggins v. Smith, 123 S. Ct. 2527, 2541 (2003) (quoting Strickland, 466 U.S. at 690-91.) "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to

investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 690-91. Furthermore, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. at 691.

B. Prejudice

To prevail on an IAC claim, a petitioner must also show that counsel's deficient performance resulted in actual prejudice to his case. A showing of prejudice requires the petitioner to prove that "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687. In the context of a capital sentencing proceeding, the question is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In Wiggins the Court reemphasized that assessing prejudice in the context of capital sentencing requires the reviewing court to "reweigh the evidence in aggravation against the totality of available mitigating evidence." 123 S. Ct. at 2542.

DISCUSSION

In his amended petition, Petitioner argues that Brogna's performance was deficient because he did virtually nothing to prepare for sentencing. Petitioner alleges that Brogna had sufficient information from which to pursue an investigation regarding Petitioner's mental health problems stemming from service in Vietnam, including hallucinations, suicide attempts and hospitalization in a mental health facility. He further alleges that

the trial court was not thoroughly informed about his family's dysfunctional history or his abuse as a child, and that daily marijuana use combined with methamphetamine use was never presented to the sentencing judge as mitigation under A.R.S. § 13-703(G)(1) (significant impairment in one's ability to know right from wrong or to control conduct.) In its remand order, the Ninth Circuit similarly identified several areas relevant to whether Petitioner received ineffective assistance of counsel at sentencing. These include Petitioner's service in Vietnam where "he witnessed the violent death of friends, and the mental breakdown that he suffered after returning to this country," the possibility of post-traumatic stress disorder ("PTSD"), the changes in Petitioner's behavior caused by his Vietnam experience, suicide attempts, and chronic amphetamine use. Lambright, 241 F.3d at 1207.

After an extended discovery period, the Court held an evidentiary hearing on November 13-21, 2003. Petitioner attended the hearing for the first four days, then voluntarily absented himself from the final two days of proceedings. During the hearing, Petitioner proffered the affidavits and testimony of numerous witnesses to establish three main areas of mitigation he alleges were not pursued or sufficiently presented by Brogna during the sentencing phase of his case: (1) PTSD (2) methamphetamine abuse, and (3) traumatic childhood. Witnesses included Petitioner, Carmine Brogna, Dr. Barry Morenz, Dr. Gina Lang, Dr. Richard Hinton, Dr. Edward French, Wanda Hadley (Petitioner's first wife) and several former members of the United States Air Force who served in Vietnam at Phu Cat Air Base during the three months that Petitioner was stationed there. The parties stipulated, at Petitioner's request, that any claim of neuropsychological deficit be abandoned

for lack of evidence.

Other evidence included declarations and statements of many witnesses including Sylvia Abshire Scott (Petitioner's second wife), Mildred Fontenot (Petitioner's sister), friends of Petitioner, military records, medical records, the probation department's presentence report, Dr. Hinton's presentence evaluation, Department of Corrections records, and mental health reports prepared by experts in conjunction with the evidentiary hearing. In all, six oversized notebooks of exhibits were utilized during the hearing. In addition, prior to the evidentiary hearing, the Court reviewed all of the transcripts from Petitioner's trial and sentencing proceedings, as well as the original trial and sentencing exhibits.

During the evidentiary hearing, Petitioner refused to answer questions about the offenses. (RT 11/14/03 at 290-303.) He declined to address whether he discussed with Foreman his desire to find out what it would feel like to kill someone, the planned kidnapping of an intended rape victim, the threatening of Owen in the backseat of the vehicle, the name or names of the persons who stabbed Owen, whether Petitioner slit Owen's throat, whether he struck Owen on the head with a rock, the theft of Owen's jewelry, efforts to cover-up the murder, and whether a macabre celebration occurred after the offense. (Id.) Petitioner also refused to answer any questions regarding whether, at the time of the kidnapping, sexual assaults and murder, he was intoxicated, suffering from hallucinations, using drugs such as marijuana or methamphetamine (and if so, the quantities thereof), experiencing flashbacks from Vietnam or suffering from other PTSD-related symptoms. (Id. at 303–05.)

A. Overview of Evidence

Youth

During the evidentiary hearing, Petitioner testified to regular whippings from a hyper-religious mother. (RT 11/13/03 at 47-52.) He also described frequent moves as a result of his father's work. (Id. at 34-35. Petitioner ran away from home when he was 12 or 13. (Id. at 62.) He testified that at the age of 15 he stayed in Orange, Texas, with his sister Mildred, when his parents with to Louisiana in connection with his father's work on a dredge. (Id. at 56.) Petitioner testified that he stopped going to school after Ninth Grade. (Id. at 180.) At 16, he permanently moved away from his parents. (Id. at 55.)

In his presentence interview with the probation department, Petitioner described the hyper-religiosity of his mother, the frequent moves and running away from home. (Ex. 10-c at 4.) He did not report being abused. In his presentence interview with Dr. Hinton, Petitioner expressly denied any abuse by his parents. (Ex. 10-d at 2.) Dr. Gina Lang, who testified on behalf of Respondents at the evidentiary hearing, said that when Petitioner described these beatings to her, he chuckled. (RT 11/19/03 at 716-17.)

After Petitioner left home, around age 17, he started discussing marriage with his girlfriend of three years, Wanda Hadley, who was 15. (RT 11/13/03 at 57.) Wanda testified that prior to Petitioner enlisting in the service, she often skipped school to be with Petitioner and that he had no job and was just running around living day to day. (RT 11/14/03 at 360-61, 363.) In her affidavit, Petitioner's sister likewise recounts that it was difficult to keep tabs on

Petitioner during this period and that she and her mother decided Petitioner needed to go into the service. (Ex. 12 at 4.) Wanda's parents agreed to let Petitioner marry Wanda if he joined the service. (RT 11/14/03 at 343.)

Military Service

Petitioner enlisted with the Air Force on October 27, 1965, and married Wanda in March 1966. Petitioner was trained as a jet engine mechanic and received regular promotions. While on temporary duty ("TDY") in England, however, an evaluation report states that "[d]uring his stay there he created many problems" and "tried numerous ways to return to the states early." (Ex. 92.) On April 6, 1968, Wanda and Petitioner had a son.

In early July 1968, Petitioner was absent without leave ("AWOL") for two days. (Exs. 36, 103.) Petitioner testified that occurred because a request for a three-day pass to move his wife to his family's home was denied. (RT 11/13/03 at 69.) Wanda testified that Petitioner told her he went AWOL because he did not want to go to Vietnam. (RT 11/14/03 at 371.)

On July 30, 1968, Petitioner arrived in Vietnam. He was assigned to a jet maintenance unit at Phu Cat Air Base. With the exception of one-month leave in the Philippines, he remained at Phu Cat Air Base until he left Vietnam four months later on November 11, 1968. (Exs. 36, 91.) Petitioner said that his mother arranged for his early discharge on family hardship grounds because his father was ill. (RT 11/13/03 at 117; Ex. 12 at 14.) Petitioner's sister says he told his mother to get him out of Vietnam because he "couldn't take it anymore." (Ex. 13 at 33.)

Vietnam Combat

Prior to his sentencing, Petitioner told the probation officer that while at Phu Cat Air Base, "he was sent out on patrols occasionally and was involved in skirmishes with the Viet Cong. During one such outing, he apparently saw two friends killed and thereafter refused to leave the camp base. (Ex. 10-c at 8.) Petitioner told Dr. Hinton, during his presentence evaluation, that "during the course of his military duty in Vietnam, he killed at least two Viet Cong in hand-to-hand combat." (Ex. 10-d at 2.) On December 7, 1983, Petitioner told a Department of Corrections ("DOC") psychologist he was involved in a severe firefight in Vietnam:

> On one patrol he got caught in a severe fire fight and several of his close military buddies were killed. He was leader of the patrol. Later in the States he had several flashback experiences when he imagined that he was being attacked again and suffered several mental breakdowns.

(Ex. 93 at 1.)

Petitioner once told his sister, Mildred Fontenot, that "he was with his unit in Viet Nam and he was the only one who made it back alive." (Ex. 12 at 4.) In an interview with Respondents' counsel in 2003, Fontenot said that Petitioner had told her he went out with a group, ran into a firefight and everyone was killed but him. (Ex. 13 at 31.) He also told her that he had to "crawl back to the base" and that he had killed "a couple" of the enemy. (Id. at 32.) Fontenot added, "I thought he was just exaggerating." (Ex. 13 at 31.) She said she thought Petitioner had

tried to make it sound more serious that it was. (Id.)

Dr. Morenz states in his May 23, 2003 report that Petitioner said he served as a security augmentee[6] at Phu Cat Air Base and "supervised five men who would patrol the perimeter around the base." (Ex. 8 at 9.) Petitioner described for Dr. Morenz a firefight in which he was involved, during which "one of his buddies, who he had known practically from the time he joined the Air Force, got killed..." (Id. at 10) Petitioner said "that his friend stood up and was cut in half by machine gun fire." (Id.) Dr. Morenz observed that "the only points during the interview when [Petitioner] became tearful were when he was speaking of his experiences in Vietnam." (Id. at 14.)

In her July 31, 2003 report, Dr. Lang states that Petitioner told her that he had "lost a friend under my command in a patrol" in Vietnam. (Ex. 107 at 6.) Petitioner told Dr. Lang "the he saw a Vietnamese team carrying explosives and the scenario erupted into a firefight. He reported that two people on patrol were killed, and only three people came back. He stated that one of the men who was killed was a 'good buddy' of his and that they went through training together. He indicated that his friend was almost cut in two and that he died in his arms." (Id.) Dr. Lang observed that "[a]t that point, Mr. Lambright abruptly stated that he did not want to talk about this topic anymore and apologized." (Id.)

---

[6] "An augmentee is a non-police member of the Air Force who is pressed into police duties because of ...impending threat." (RT 11/18/03 at 396.) Petitioner testified that he volunteered to serve as an augmentee and received one day of special training. (Id. at 84-85.)

During Petitioner's testimony at the evidentiary hearing, he testified that while on security patrol at Phu Cat Air Base, his patrol ran into a five-man Viet Cong unit and that a friend of his from technical school, named Neinhart, was cut almost in half by machine gun fire. (RT 11/13/03 at 90-111.) Petitioner was uncertain how to spell his friend's last name and could not recall his first name. (Id. at 94.) Petitioner said that when he tried to report the incident, he was told that "it didn't happen." (Id. at 113.) Petitioner testified that when he returned to his bunk, he saw that Neinhart's belongings had been removed and a sign said that Neinhart had gone TDY. (Id. at 114.) When Petitioner described this event in court, he wept softly.

Respondents called several witnesses who served at Phu Cat Air Base when Petitioner was stationed there. Each of these witnesses, including the head of all security police at the base during the relevant time period, testified that during the time Petitioner was assigned to the base, no fatalities occurred there. Respondents also offered documentation that no one named Neinhart was killed in Vietnam. (exs. 96, 96-a) and that the combat event described by Petitioner is absent from all official records. (exs. 95, 105, 106.) In addition, Respondents presented the affidavit of one Frederick Neidhardt, who served in the same unit with Petitioner at Dyess Air Force Base in Texas prior to Petitioner's tour in Vietnam. (Ex. 71.) His affidavit states that he and Petitioner were friends but that he has not seen or communicated with Petitioner since early 1967. (Id. at 2.) On cross-examination, Petitioner denied knowing this Fredrick Neidhardt and said this was not the "Neinhart" who was killed at Phu Cat. (RT 11/14/03 at 283.) Petitioner further

testified that he did not recall making the statements attributed to him by the probations officer. (id. at 321.), Dr. Hinton (id. at 322), his sister (id. at 315), or the DOC psychologist (id at 320) regarding his Vietnam combat experience.

Return to United States After Discharge

Petitioner left Vietnam on November 11, 1968. He testified that he was supposed to participate in the reserves, but never reported and nothing happened. (RT 11/13/03 at 120.) Upon his return, Petitioner got a job with Lockheed rebuilding Huey helicopters from Vietnam. (Id. at 126, 140.) The position lasted only six to nine months, until Lockheed's contract expired. In his interview with Dr. Morenz, Petitioner said he had liked the Lockheed job because it "kept him connected in some way to Viet Nam." (Ex. 8 at 10.) However, Petitioner also told Dr. Morenz that after returning to the United States, he had nightmares, disliked movies about the Vietnam War and became upset at the sound of Huey helicopters. (Id. at 10-11.) On cross-examination, Petitioner admitted that he has seen *The Green Berets, Apocalypse Now, Deerhunter, Casualties of War, Platoon, Good Morning Vietnam, Full Metal jacket,* and *Forrest Gump.* (RT 11/14/.3 at 306-10.) Each of these movies contain graphic depictions of the Vietnam War. Petitioner also acknowledged on cross-examination that he had not heard the sound of a Huey helicopter since the 1970s. (Id. at 311-12.)

Marital Problems and Anxiety Attack

Wanda Hadley testified that upon Petitioner's return to the United States in 1968, he was jumpy, restless

and had bad dreams. (Id. at 349-50.) She said Petitioner was unhappy, they argued more frequently, he did not want to have sex with her, and he used drugs. (Id. at 354-57, 367.) After one argument, Petitioner attempted suicide by driving his car into a tree. (RT 11/13/03 at 142.) Within a year of his return, Petitioner had caught Wanda in bed with another man, and Wanda told him she had been involved with other men. (RT 11/14/03 at 357; RT 11/13/03 at 131; Ex. 21 at 22.) Shortly thereafter, on August 18, 1969, Petitioner was admitted to a Veterans Administration hospital for several days with complaints of anxiety. (Ex. 21 at 22.) The hospitalization occurred shortly after Petitioner had gone to his sister's house in the middle of the night and banged on her screen door. (Ex. 12 at 5.) When she got up to see who it was, she saw Petitioner cowering against a wall, swinging a butcher knife. He was crying and kept saying, "I gotta get to 'em. I see 'em. They're burning Mama and Daddy, they're burning." (Id.) Wanda and Petitioner separated in 1969 and divorced in March 1970. In 1971, Petitioner's father died. Petitioner told Dr. Morenz that this was one of the most difficult periods in his life. (Ex. 8 at 11-12.)

New Relationships

In 1972, Petitioner met Sylvia Abshire (Scott), who at the time was married with two children. (RT 11/13/03 at 148.) Petitioner told Dr. Lang that after Sylvia cooked dinner for Petitioner and two of his friends, she engaged in a ménage a trios with the two friends, "but then looked up and said that she would rather be having sex with [Petitioner]." (Ex. 107 at 4.) They began living together, and in April 1973, the couple's daughter was born. During this time, Petitioner also met co-defendant Robert Smith and

began smoking marijuana regularly. (RT 11/13/03 at 153-54.) Up to this point, Petitioner had not used recreational drugs but had only taken speed (diet pills) for work as a truck driver. (Id. at 150-51.)

1974 Overdose

On December 11, 1974, Petitioner was admitted to Galveston County Memorial Hospital after he "took [a] bunch of pills" and overdosed. (Ex. 44.) Petitioner testified that he tried to kill himself, but doesn't know why. (Rt 11/13/03 at 166-67.) He had a bottle of pain medication sitting next to a bottle of Valium prescribed to Sylvia and decided to take them all because he did not want to wake up. (Id.)

Marriage to Sylvia

Petitioner married Sylvia in 1975 or 1976. (Ex. 21 at 108.) Around this same time, Petitioner took crystal methamphetamine for the first to help him stay awake for a trucking job, and thereafter began using methamphetamine regularly to stay awake for work. (RT 11/13/03 at 159, 161-62.) He also experimented with a number of other substances, including LSD, hash, cocaine and hallucinogenic mushrooms. (Id. at 163; Ex. 8 at 12; Ex. 107 at 6.)

Sylvia and Petitioner's marriage was an "open" one; either could have sex with anyone they wished. (Id. at 152, 167-68.) Petitioner said that Sylvia ruined the open marriage by having a relationship with Louis Scott, her soon-to-be-next-husband, without telling him about it. (Id. at 173.) Sylvia submitted a declaration describing domestic violence committed by Petitioner against her and her son from a prior marriage. (Ex. 112.)

In Sylvia's declaration, she described a time in 1978 when Petitioner "hammered a nail into the front door, hung a meat cleaver on the nail, and told [Sylvia] that he would use it on Louis and [Sylvia] if he ever caught [them] together again." (Id. at 3.) Petitioner and Sylvia separated in early 1980. Prior to his involvement in the crimes committed in March 1980, Petitioner described living "a variable lifestyle" in which "he would go to work and get off and party. In his free time, . . . he would 'build engines, make love, and get high.'" (Ex. 107 at 7.)

Criminal Activity

On cross-examination, Petitioner admitted to participation in several crimes between 1968-1980, including a 1971 armed robbery of a filling station. (RT 11/14/03 at 288-89.) Petitioner used a Saturday night special during the robbery but was never apprehended. Petitioner also admitted to committing a car theft and discussing the planned robbery of an armored truck. (Id. at 289.) Petitioner said that he planned the robbery with a friend, but decided it was not feasible. (Ex. 8 at 5.) The presentence report states Petitioner admitted engaging in petty property offenses during the ten years preceding the crime, primarily during road trips such as the one that led to the victim's death in this case. (Ex. 10-c at 5.)

1980 Road Trip

In early 1980, 18-year-old Foreman left her four-week-old son to live with then-32-year-old Petitioner. Petitioner, co-defendant Smith, Kathy Foreman and Smith's girlfriend went to Florida in February 1980. (Ex. 8 at 4.) While in Florida, the group picked up a male hitchhiker. They robbed him and left him standing on the side of the road naked.

(Id. at 5.) The group returned to Texas, where Smith's girlfriend decided to stay, and then the remaining trio embarked on a cross-country trip that ultimately led to the kidnapping, rape and murder of Sandra Owen. Afterward, Smith expressed concern that Foreman would turn them in. In an interview with his psychiatric expert for these habeas proceedings, Petitioner says that he made it clear to Smith that Foreman was not to be hurt, "but in retrospect thinks it might have been a good idea." (Ex. 8 at 6.)

Expert Evaluations

Petitioner's psychiatric expert, Dr. Morenz, met with him in 2002 and 2003. Dr. Morenz concluded that at the time of the murder, Petitioner suffered from PTSD arising from his combat experience in Vietnam. (Ex. 8 at 15.) Dr. Morenz's diagnosis is based in part on the fact that Petitioner still becomes emotional and tearful when talking about his friend being cut in half by machine gun fire and that Petitioner has "persistently reexperienced" the trauma. (Id.) Respecting the latter, Dr. Morenz points to the incident preceding Petitioner's hospitalization in 1969 as well as Petitioner's claimed reluctance to hear certain types of helicopters or watch Vietnam-related movies. In addition to PTSD, Dr. Morenz concluded that Petitioner has suffered from varying levels of depression most of his life and that stimulant abuse may have influenced his violent behavior. (Id. at 18.)

Respondent's psychological expert, Dr. Lang, administered a battery of psychological tests on Petitioner and concluded that he did not suffer from PTSD at the time of the offense. Dr. Lang's conclusion is based on several factors: (1) a lack of

reported PTSD-related symptoms by Petitioner at the time of the murder (i.e., flashbacks); (2) inconsistent statements by Petitioner concerning his combat experience; (3) a lack of specificity to Vietnam in post-Vietnam symptoms (i.e., dreams); and (4) Petitioner's stated understanding of the wrongfulness of his behavior. (Ex. 107 at 11.) Dr. Lang also observed that Petitioner "exhibits the tendency to externalize responsibility for most of his problems" and that "[t]he most prominent theme [from the psychological testing] appears to be related to his wishes for freedom and his distress about being incarcerated." (Id. at 9, 10.) Petitioner also told Dr. Lang that the only person he still trusts is his co-defendant, Smith. (Id. at 8.)

Trial Counsel

Petitioner's trial counsel, Carmine Brogna, had been an experienced prosecutor and defense attorney at the time he began representation of Petitioner in 1981. After graduating from the University of Arizona's College of Law in 1970, Brogna clerked for U.S. District Court Judge William Copple. (Ex. 10 at 6.) Following the clerkship, Brogna served as a deputy Pima County Attorney in the criminal division for almost four years. During this period, he prosecuted six to seven homicide cases and gained significant experience in criminal mental health issues. (RT 11/20/03 at 788-89.) After entering private practice, Brogna represented a number of defendants charged with first-degree murder who potentially faced the death penalty. (Id. at 789-90.)

In preparation for trial in this case, Brogna and co-defendant Smith's counsel sought and received authorization to travel to Orange, Texas/Lake Charles, Louisiana area for five days. (Id. at 754,

792.) Brogna sought out witnesses that had been identified by Petitioner, but had difficulty locating many of them because of their transient lifestyles. (Id. at 757, 797.) Brogna testified that it was not "friendly county" and that a lot of the places were in the "boondocks." (Id.) Nonetheless, Brogna interviewed more than ten people, including Petitioner's employers and coworkers, and his sister, Mildred Fontenot. (Id. at 755, 796.) Fontenot relayed Petitioner's social and living conditions before the crime and general information about Petitioner's background. (Id. at 756, 760.) Brogna testified that he felt Petitioner and his sister were not very close and that overall the information he obtained on this investigative trip was not beneficial. (Id. at 796-97.)

In February 1982, prior to trial, Brogna disclosed several possible witnesses, including Petitioner's friends, his sister and a co-worker. (Ex. 10-f.) The disclosure also indicated that counsel had requested Petitioner's medical records from the Veteran's Administration in Houston, Texas. (Id.) Although he lacked independent recollection during the evidentiary hearing, Brogna surmised from the disclosure that he must have known before trial about Petitioner's psychiatric hospitalization. (RT 11/20/03 at 765-67.) In addition, he emphasized Petitioner's breakdown in his mitigation memorandum, stating that Petitioner "relates this hospitalization directly to his Vietnam military experience." (Ex. 10-e at 2.) Brogna did not, however, seek appointment of a mental health professional to evaluate Petitioner to explore the basis for the breakdown. (RT 11/20/03 at 764.) Nor could Brogna recall if he had tried to identify or locate anyone that had served with Petitioner in Vietnam or if he had spoken to Petitioner's ex-wife concerning his return from

Vietnam. (Id.) During his deposition, Brogna explained that he no longer had a file or case notes and that he lacked independent recollection of his thought processes at the time of the trial and sentencing. (Ex. 10 at 36.) However, Brogna did indicate that it was customary for defense counsel to rely on the probation department's presentence report for mitigation evidence. (RT 11/20/03 at 803.) In this case, the probation officer gathered records, interviewed Petitioner and his sister extensively, and referred Petitioner for a psychological evaluation.

B. Findings of Fact

1. PTSD

The Court finds that Petitioner's testimony with respect to the trauma underlying his expert's PTSD diagnosis (the alleged combat experience) is less than credible. More importantly, the Court finds that, even if a diagnosis of PTSD is warranted, Petitioner has failed to establish how such a disorder affected his actions at the time of the offense.

Petitioner's claims regarding his Vietnam combat experience are consistently inconsistent. Since his return from duty, Petitioner has relayed significantly different versions of the tale to his sister, the probation officer, and various mental health experts. In addition, Petitioner's claim that the man who died in his arms was his best friend, Neinhart, is particularly suspect. Respondents produced persuasive documentary evidence establishing that no combat engagements occurred at Phu Cat Airbase during Petitioner's tour of duty. In addition, Respondent's witnesses, one of whom have a stake in these proceedings, testified credibly that no fatalities occurred at the base while Petitioner was there and that mechanics such as Petitioner, if used as security

augmentees, would not have been placed in the type of patrol group described by Petitioner. Critically, Respondents also produced evidence showing that no one named Neinhart (or Neidhardt or Kneihart) was killed during Vietnam and that a Frederick Neidhardt, who coincidentally served with Petitioner in Texas, was friends with Petitioner at the time but did not go to Vietnam and is very much alive. Despite extensive discovery time and resources, Petitioner has failed to provide *any* corroborating evidence of the alleged combat experience. The suggestion of a conspiracy to "coverup" Neinhart's death is too fantastic to take seriously. After reviewing all of the evidence, the Court concludes that Petitioner's combat tale is a fabrication.

Petitioner's pre-Vietnam lifestyle, limited as it was, also does not support the claim that Vietnam was a life-altering experience which somehow contributed to the crimes at issue. Before going to Vietnam, Petitioner had been expelled from high school and was jobless and drifting. He conceded as much to Dr. Morenz, telling the doctor he "floated" after leaving high school. (Ex. 8 at 9.) Before going to Vietnam, he received a significant adverse evaluation regarding his TDY service in England and later went AWOL for two days. After returning from Vietnam, Petitioner committed an armed robbery and a car theft and planned another robbery. The Court is not persuaded that the several months spent servicing the jet engines at an Air Force base in Vietnam contributed significantly to his mental state at the time of the offense.

Nor is the Court persuaded by Dr. Morenz's PTSD diagnosis, which rests almost exclusively on the alleged combat experience as the traumatic

trigger event.[7] Dr. Morenz's reliance on Petitioner's assertions that he did not want to remember anything about Vietnam and that the sound of Huey helicopters upset him are belied by Petitioner's statement to Dr. Morenz that after leaving the service he liked his job with Lockheed (rebuilding Huey helicopters) precisely because "it kept him connected in some way to Viet Nam." (Ex. 8 at 10.) Dr. Morenz's diagnosis also rests on the conclusion that Petitioner "experienced vivid flashbacks" which led to a brief hospitalization. However, the hospital record indicates only that Petitioner complained of "anxiety," and says nothing about a flashback episode. (Ex. 84.) Petitioner's sister, who witnesses the incident precipitating the hospitalization, also did not report any Vietnam-related basis for her brother's behavior. Rather, she stated that Petitioner learned of his wife's infidelities just prior to the breakdown. (Ex. 12 at 5; see also RT 11/13/03 at 186-87. In any event, Petitioner testified during his deposition that he has never had a "flashback" of a real episode from Vietnam. (Ex. 81 at 133-34.) In sum, the court finds that Dr. Morenz's conclusions are not well founded. Dr. Lang's conclusion that Petitioner is not suffering from PTSD is a more accurate assessment and makes the most sense in light of the evidence as a whole.

Even were the Court persuaded that Petitioner suffered from PTSD, Petitioner has failed to show

---

[7] Dr. Morenz' report expressly refers to the combat episode described by Petitioner as the trauma underlying the PTSD diagnosis. (Ex. 8 at 15.) During the evidentiary hearing, however, he shifted emphasis away from the specific combat episode and testified that Petitioner's Vietnam experience generally may have been a sufficient trigger: "merely being in a base where there was mortar fire and considerable danger is also potentially enough to satisfy this diagnosis." (RT 11/19/03 at 605-06.)

how the disorder affected his criminal behavior. Petitioner refused to answer any questions regarding how his Vietnam experience might have affected his actions. In a civil habeas proceeding, it is the petitioner, and not the government, that bears the burden of proof to show that his detention violates federal law. Prior to and during the evidentiary hearing (Dkt. 258; RT 11/14/03 at 292), the Court directed that use of Petitioner's deposition and hearing testimony would be limited to these proceedings and could not be introduced at any rsentencing. See Degen v. United States, 517 U.S. 820, 826 (1996) (protective orders may be used "to prevent parties from using civil discovery to evade restrictions on discovery in criminal cases"). Nonetheless, Petitioner chose not to answer questions relevant to his habeas claim. Accordingly, the Court draws an adverse inference from Petitioner's refusal to explain how his Vietnam experience affected his mental state at the time of the crime. See Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (holding that Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify); Bean v. Calderon, 166 F.R.D. 452, 455 (E.D. Cal. 1996) ("[P]etitioner must establish the facts that would give rise to the overturning, and if he refuses to put forth facts that are within his knowledge, and which are pertinent to the claims that he has made in habeas, an adverse inference may be drawn."). Furthermore, Dr. Morenz conceded that he could not say whether, much less how, PTSD affected Petitioner's criminal actions. (RT 11/19/03 at 662-65.) The Court finds that even if Petitioner did suffer from PTSD, the disorder was not a significant factor affecting Petitioner's behavior at the time of the murder.

2. Methamphetamine Abuse

The Court finds no credible evidence that methamphetamine abuse contributed to Petitioner's criminal actions. Petitioner has presented no evidence to support the assertion that he was under the influence of drugs at the time of the crime. As already explained, Petitioner declined during the evidentiary hearing to answer questions posed by Repondents as to the types and quantities of any narcotics consumed up to and during commission of the offense; therefore, the Court infers that Petitioner was not acting under the influence of drugs. See Baxter, 425 U.S. at 318; Bean, 166 F.R.D. at 455. In addition, Petitioner candidly admitted to Dr. Lang that he was not intoxicated at the time of the crime. (Ex. 107 at 8.) "He subsequently admitted that he was 'high' when the offenses occurred, but said he blames the crime 'on stupidity' rather than on drugs." (Id.) Furthermore, Petitioner's statement of the offense to authorities more than a year after the crime included detail that was corroborated by both Foreman's testimony and forensic evidence, and which undermines any claim that Petitioner was impaired at the time of the crime.

3. Traumatic Childhood

Petitioner presented evidence through his own testimony and the affidavit of his sister regarding their home life as children. He described frequent moves due to his father's work and whippings by his mother using anything she could get her hands on, including during one instance an apple crate. Despite this history, Petitioner told Dr. Lang that he did not have a "bad" childhood and that he did not feel he was abused more than other kids at the time. (Ex. 107 at 2.) He also chuckled with Dr. Lang when he

described being beat by his mother. (Id.) With Dr. Hinton, who evaluated him prior to sentencing, Petitioner denied being abused as a child. (Ex. 10-d at 2.)

Although Petitioner's upbringing was not ideal, his childhood experiences were not as appalling as to garner significant mitigation weight. Undeniably, he has a very strict mother who believed in whippings as a form of punishment and discipline. However, Petitioner acknowledges that, at the time, he did not consider the whipping to be abuse. He also concedes that the whippings left only bruises; he chronicled no broken bones or hospitalizations as a result of his mother's discipline. Petitioner also spoke highly of his father, someone he clearly admired. On balance, the Court concludes that Petitioner's upbringing was not so horrific that it significantly affected Petitioner's conduct at the time of the crime.

C. Conclusions of Law

1. Deficient Performance

It is undisputed that in a capital case defense counsel has an obligation to investigate and consider any and all potential mitigation evidence. See, e.g., Caro v. Calderon, 165 F.3d 1223, 1227 (9th Cir. 1999). This duty to investigate is not limitless; "it does not necessarily require that every conceivable witness be interviewed." Hendricks v. Calderon, 70 F.3d 1032, 1040, (9th Cir. 1995). For example, in Babbitt v. Calderon, the Ninth Circuit found that counsel was not ineffective for failing to uncover a family history of mental illness where counsel's investigators spoke with family members and friends who might have had such information, but none of them reported any history of illness. 151 F.3d 1170, 1174 (9th Cir. 1998.)

Here, Brogna interviewed Petitioner's only sibling extensively and concluded that she and Petitioner were not very close; a conclusion corroborated in these proceedings. (See ex. 8 at 7.) Other than regular whippings from his mother, Petitioner has not presented any substantially new evidence concerning his upbringing that was not already before the sentencing judge by way of the presentence report and Dr. Hinton's evaluation. The sentencing judge considered Petitioner's disadvantaged background in the weighing process. In addition, although Dr. Hinton's report noted Petitioner's past abuse of drugs, Petitioner never claimed to Brogna that the victim died as a result of a violent outburst related to a methamphetamine binge. (RT 11/20/03 at 807.) Brogna testified during his deposition that he "did not get any sense or facts to enable [him] to posture a defense" based on diminished responsibility from drugs or alcohol. (Ex. 10 at 61.) While counsel could have better emphasized Petitioner's years of drug abuse, the Court cannot say that it was unreasonable not to focus on drug abuse as a mitigating factor in the absence of any explanatory nexus to the crime. See Mayfield v. Woodford, 270 F.3d 915, 931 n. 17 (9th Cir. 2001) (en banc) ("We note that juries are unlikely to favor defenses based on abuse of dangerous drugs in evaluating a defendant's culpability for violent behavior.").

With respect to Vietnam, Brogna testified that neither Petitioner nor any of the witnesses he interviewed claimed that Petitioner suffered from PTSD or that Petitioner had experienced a Vietnam flashback at the time of the killing. (RT 11/20/03 at 805-06.) Petitioner argues that both the presentence report and Dr. Hinton's evaluation should have put counsel on notice of possible mental health issues.

However, as Brogna testified, it was customary at the time of Petitioner's trial for defense counsel to rely on information gathered by the probation department in preparation for sentencing. Dr. Hinton interviewed Petitioner and conducted personality testing. Such testing would have revealed an elevated anxiety score (possible indicating PTSD) if one existed. (Rt 11/14/03 at 230.) No such elevation was noted by Dr. Hinton. (Id.) Counsel cannot be faulted for failing to investigate PTSD when neither Petitioner, his sister nor Dr. Hinton suggested that the few months Petitioner spent in Vietnam so altered him that the experience provided a possible explanation for Petitioner's participation in the killing. "[C]ounsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put counsel on notice of the existence of that evidence." Douglas v. Woodford, 316 F.3d 1079, 1088 (9th Cir.), cert. denied, 124 S. Ct. 49 (2003).

The brevity of Brogna's penalty phase presentation is troubling. However, length alone does not render a performance constitutionally inadequate. Cf. Bell v. Cone, 535 U.S. 685, 701-02 (2002) (upholding dismissal of habeas petition challenging counsel's representation where he did not present any mitigation evidence and waived closing argument); Darden v. Wainwright, 477 U.S. 168, 185-87 (1986) (finding no ineffectiveness where counsel presented no mitigation evidence and relied instead on a plea for mercy from the defendant). Here, counsel referenced, albeit in abbreviated form, many of the same mitigating factors identified in these proceedings: Petitioner's disadvantaged upbringing, lack of a violent criminal record, and co-conspirator Foreman's immunity. Other factors such as suicide attempts, hospitalization and abuse of drugs were already before the sentencing judge and considered in

the weighing process. The Court therefore concludes that Brogna's presentation was not constitutionally deficient.

2. Prejudice

Assuming Brognas's representation was objectively unreasonable, Petitioner is unable to establish that Brogna's errors prejudiced him. Petitioner must "affirmatively prove prejudice," Strickland, 466 U.S. at 693, which requires showing more than just the *possibility* that Brogna's performance prejudiced the outcome against him. Instead, Petitioner must demonstrate that the errors *actually* prejudiced him. See id. Whether an error actually prejudiced a defendant is weighed against the "totality of the evidence before the judge or jury." Id at 695. Therefore, in determining whether an impartial sentencer would conclude that prejudice has been established, the Court considers both the evidence developed during the habeas evidentiary hearing, which Petitioner argues should have been presented at sentencing, along with the mitigating evidence already considered by the state court. See Douglas v. Woodford, 316 F.3d at 1086, 1089.

With respect to PTSD and Petitioner's Vietnam combat experience, the Court has concluded that neither has been proven. Because Petitioner has failed to establish that he was in combat or suffered from PTSD, the Court cannot say that Petitioner's sentence would have been different had Brogna conducted a full-blown investigation into Petitioner's Vietnam experiences. Moreover, even if PTSD were a viable diagnosis, it has not been shown to have any explanatory or exculpatory attributes with respect to Owen's murder and, therefore, is not significantly weighty. Cf. Douglas v. Woodford, 316 F.3d at 1090 ("Evidence regarding social background and mental

health is significant, as there is a belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background or to emotional and mental problems, may be less culpable than defendants who have no such excuse.") (internal quotation omitted).

Regarding Petitioner's substance abuse problem, as noted above, the sentencing judge was already well aware of it through the presentence report. There was not much more evidence that Brogna could have uncovered that would have been helpful or that the sentencing judge did not already know with respect to Petitioner's drug use. In addition, Petitioner never argued that he was under the influence of alcohol or drugs when he committed the murder. Therefore, any evidence of substance abuse could not have mitigated the circumstances of the crime itself. Consequently, for the evidence to be significantly mitigating, it would have had to persuade the sentencing judge to spare Petitioner's life merely because of his years of substance abuse. The judge was aware of Petitioner's history of drug abuse at the time of sentencing. This Court cannot say that counsel's failure to more strongly emphasize this evidence prejudiced Petitioner.

Similarly, Petitioner's childhood, though bleak, was largely identified to the sentencing judge. The witnesses in their affidavits and at the evidentiary hearing indicated that if asked, they would have testified as to Petitioner's upbringing and his problems with drugs. However, all of this information was in the presentence report, which the sentencing court considered for mitigation purposes. The Court had already noted that Petitioner failed to prove his upbringing affected his ability to know right from wrong or to control his conduct. See A.R.S. § 13-703(G)(1). While his upbringing was clearly not ideal,

it is hardly the type that renders one less culpable in the eyes of the sentencer or predetermines one's fate. Cf. Wiggins, 123 S. Ct. at 2533 (petitioner's mother had forced him to beg for food and eat paint chips and garbage, had sex when men while her children slept in the same bed and forced petitioner's hand against a hot stove burner; petitioner had been abused by two foster mothers, repeatedly molested and raped by a foster father, and gang-raped by a foster mother's sons); Williams, 529 U.S. at 395-96 (petitioner's parents had been imprisoned for criminal neglect; petitioner had been severely and repeatedly beaten by his father and spent two years in the custody of the state social services bureau; petitioner was also borderline mentally retarded); Ainsworth v. Woodford, 268 F.3.d 868, 875-76 (9th Cir. 2001) (petitioner's father had tried to commit suicide four times, finally succeeding on Christmas Day; petitioner had been severely physically, verbally, and emotionally abused by his father who had twice attempted to kill him; petitioner suffered from acute alcoholic intoxication, psychoneurotic disorder, and depressive reaction and had tried to kill himself six or seven times by slashing his wrists).

Every capital case involves terrible facts, but a sentencing judge considers just how terrible the facts are when weighing the mitigating evidence. The special verdict in this case reveals that the sentencing judge found this to be an exceptionally cruel case. Petitioner announced the morning of the kidnapping that he wanted to "see what it would feel like to kill somebody." The victim was a mentally disabled women who did not struggle and complied with her kidnapper's demands. The murder itself evidenced extreme depravity. Petitioner has not shown to this Court that additional information about his upbringing, substance abuse problems or service in

Vietnam would have made a difference at sentencing. "No doubt counsel could have done more; more is always possible. But [this Court] cannot see any reasonable probability that more in this case would have led to a different sentence." Pizzuto v. Arave, 280 F.3d 949, 969 (9th Cir. 2002), precedential effect stayed by, 345 F.3d 1119 (9th Cir. 2003).

CONCLUSION

Having read all of the trial and sentencing transcripts, listened to all of the testimony at the evidentiary hearing, and reviewed all relevant exhibits, the Court finds that Petitioner's claims regarding PTSD and methamphetamine use contributing to his conduct at the time of the brutal kidnapping, rape and murder of a vulnerable victim are not supported by the evidence. Although only one aggravating factor was established in this case, it was a significant one. The case against Petitioner, which included Petitioner's confession, testimony of an eyewitness, and Petitioner's possession of the victim's jewelry, against the backdrop of an entirely merciless and shocking abduction, rape and murder, was unshakable, the many hours of investigation and retrospect devoted to Petitioner's case by two very able habeas attorneys, a mitigation specialist and a psychiatrist notwithstanding.

Mitigation evidence plays a significant role in the penalty phase of the capital case and is more critical in Arizona because the presence of an aggravating factor without mitigation evidence requires the court to impose the death penalty. See A.R.S. § 13-703(E). In a case like the instant one, however, where the avenues of potential mitigation evidence are either unsubstantiated or were already before the sentencing judge, the Court is not persuaded that any deficiencies in counsel's

representation rendered the sentencing proceedings "fundamentally unfair or unreliable." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). While it is highly improbable that the sentencing court would have spared Petitioner's life had it been informed of the additional evidence detailed above, the prejudice prong of Strickland requires more than a *possibility* of a different result. Because this Court finds that there is no reasonable probability of a different outcome, Petitioner is not entitled to relief on his IAC penalty phase claim.

Accordingly,

IT IS HEREBY ORDERED that Petitioner's claim of ineffective assistance of counsel at sentencing is DENIED WITH PREJUDICE.

IT IS FURTHER ORDERED that the Clerk of Court shall enter judgment in accordance with this Order and send copies of this Order to all counsel of record, to Petitioner and to the Capital Case Staff Attorney.

IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this Order to Noel Dessaint, Clerk of the Arizona Supreme Court, 1501 W. Washington, Phoenix, AZ 85007-3329.

DATED this 26 day of August, 2004.

/s/
John M. Roll
United States District Judge

APPENDIX C

TERRY GODDARD
Attorney General

JAMES P. BEENE (State Bar #014119)
Assistant Attorney General
ROBERT L. ELLMAN (State Bar #014410)
Assistant Attorney General
Capital Litigation Section
1275 W. Washington Street
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

Attorneys for RESPONDENTS

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOE LEONARD LAMBRIGHT, Petitioner, -vs- DORA B. SCHRIRO, et al., Respondents.	CV 87-235-TUC-JMR [Death Penalty Case]

AFFIDAVIT

STATE OF ALABAMA)
ss.)
County of Mobile)

I, Fredrick Warner Neidhardt, being first duly sworn upon oath, hereby depose and state:

¶ 1. My full name is Fredrick Warner Neidhardt. I was born on August 10, 1946. I am alive and well. I currently reside at 4411 Lott Road, No. 1, Eight Mile, Alabama, 36613-9027. My telephone number is (251) 645-1350.

¶ 2. I served as an airman in the United States Air Force. I was inducted on November 8, 1965. I remained on active duty until my honorable discharge from active service on October 28, 1969. I attained the rank of sergeant, which is classified as E-4, and held that rank at the time of my discharge.

¶ 3. In 1966, I was assigned to the 516th Field Maintenance Squadron and stationed at Dyess Air Force Base in the state of Texas. I was stationed at Dyess Air Force Base from April, 1966 to March or April of 1967. While I was stationed at Dyess Air Force Base, I met Joe Lambright. Joe Lambright was also assigned to the 516th Field Maintenance Squadron when I was stationed at Dyess Air Force Base. Joe Lambright and I became friends. During the time period when I was stationed at Dyess Air Force Base, I would occasionally visited some cousins of mine who lived in Abilene, Texas. Joe Lambright accompanied me on several of those visits.

¶ 4. In 1967, I was transferred from Dyess Air Force Base to Langley Air Force Base in Virginia. After I left Dyess Air Force Base in 1967, I never saw or communicated with Joe Lambright again.

¶ 5. I do not remember any person other than my relatives, during the time I knew Joe Lambright, who had the last name "Neidhardt." I do not remember any person other than my relatives, during the time I knew Joe Lambright, who had a list name sounding like "Ninehart," or who had a last name similar to "Neidhardt."

¶ 6. I was never at the Phu Cat Air Base in Vietnam. I never served as an augmentee to the Security Police. I was not in combat at any time. I was neither wounded nor killed in action in Vietnam.

¶ 7. During the summer of 2003, I received a telephone call from a man who asked me whether I served at the Phu Cat Air Base in Vietnam. The phone call came at approximately 6:30 or 7:00 AM. The man who telephoned me said that he was trying to find out whether his client was lying to him. This man also told me that according to his client, I died in Vietnam. I remember joking with the man who telephoned me that if I had known I was dead, I would not have bothered to mow my lawn. I do not remember the name of the man who telephoned me, or if the man told me his name. However, he said he was a researcher for an attorney.

¶ 8. Approximately two months after I received the telephone call described in paragraph 7,

above, I received a telephone call from a man who identified himself as Robert Ellman of the Arizona Attorney General's Office. Mr. Ellman asked me if I served at Dyess Air Force Base, if I knew someone named Joe Lambright when I was in the Air Force, and if I was ever stationed at Phu Cat Air Base. During the first part of my telephone conversation with Mr. Ellman, I assumed that the person I had spoken to earlier (see paragraph 7, above) worked for Mr. Ellman. I told Mr. Ellman about the telephone call I had received earlier (see paragraph 7, above), and he told me that he had no knowledge of the earlier telephone call descried in paragraph 7, above.

Nothing further.

s/Fredrick Warner Neidhardt
FREDRICK WARNER NEIDHARDT

SUBSCRIBED AND SWORN to before me this 31st day of October, 2003.

s/ Lizzie W. Trit
NOTARY PUBLIC

My Commission Expires:
NOTARY PUBLIC STATE OF ALABAMA
AT LARGE
MY COMMISSION EXPIRES: Feb. 5, 2007
BONDED THRU NOTARY PUBLIC UNDERWRITERS

APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOE LEONARD LAMBRIGHT,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CV-87-235-TUC-JMR
	)	
DORA B. SCHRIRO, et al.,	)	
	)	
Respondents.	)	Tucson, Arizona
	)	November 20, 2003

VOLUME V

TRANSCRIPT OF EVIDENTIARY HEARING

BEFORE THE HONORABLE JOHN M. ROLL

UNITED STATES DISTRICT JUDGE

APPEARANCES:

On behalf of the Petitioner: Mr. David P. Tiers
35 East University Blvd.
Tucson, AZ 85705-7736

Mr. Michael J. Addis
P.O. Box 86958
Tucson, AZ 85754-6958

On Behalf of the Respondents: Mr. Robert L. Ellman
Mr. James P. Beene
Office of the Attorney General
Criminal Appeals Section
1275 W. Washington
Phoenix, AZ 85007-2997

Court Reporter: Aaron H. LaDuke
Official Court Reporter
U.S. District Court
405 W. Congress St.
Tucson, AZ 85701

A. Reluctant to talk.

Q. And did you talk to other people in addition to police officers?

A. Yes.

Q. And did you and Mr. Hippert talk together to some people other than police officers?

A. I think we did talk together to some witnesses, many of them.

Q. Many of them?

A. We talked together.

Q. And did you talk separately to any individuals? Do you recall that?

A. I may have. You know, I don't have a specific recollection of that.

Q. Okay.

A. I –

Q. I'm sorry, did I interrupt?

A. I tend to think I did, but I don't have that firm in my mind. I don't have that recollection.

Q. Do you recall whether or not you spoke to Mr. Lambright's sister?

A. Yes.

Q. And –

A. I did.

Q. Yes, you did, okay. Do you recall your interview of Mr. Lambrights's sister?

A. Very generally and very vaguely.

Q. Do you recall what you talked about with her?

A. Yes, I do, generally.

Q. What's that?

A. I talked about, as I recall, talked about his social and living circumstances before this trip to the Tucson area. I talked about after the crimes his return to Orange, Texas, statements he made to her, items that he presented, showed her, physical evidence. I talked to her about his relationship, I remember, with Kat Foreman, the accomplice in this case who was not charged, tried to get a general feeling and information about his background, that type of thing, and also leads to

talk to other witnesses she might point to that would be helpful in some way in his defense.

Q. And in that regard do you remember the names of any other witnesses you might have talked to that his sister might have told you about?

A. Well, I know we talked or tried to talk to a Benny VanArsdale, and I don't know whether it was Mr. Lambright who put us on to him or whether it was his sister. And yes, I believe she mentioned other friends of his in the Orange/Lake Charles area, but that's as much as my recollection – as far as it goes.

Q. So other than the kind of general information you've

Page 796

BY MR. BEENE:

Q. During your time in Orange you spoke with Mildred Lambright Fontenot; isn't that correct?

A. Yes.

Q. And you also interviewed some of Mr. Lambright's employers and coworkers during this time, right?

A. Yes.

Q. Would you agree with me, Mr. Brogna, that you interviewed more than ten people during this week while you were in Orange, Texas?

A. My recollection is we did, yes.

Q. And Mildred Fontenot was one of the individuals that Mr. Lambright told you to interview prior to leaving for Orange, Texas; would that be a fair statement?

A. Yes.

Q. Would it also be correct that during your interaction with Ms. Fontenot it became clear to you that Mr. Lambright and Ms. Fontenot weren't very close?

A. I had that feeling. You know, there was times he wasn't there a lot.

Q. I believe it was your testimony on direct examination that Mr. Lambright had told you, had given you names of individuals in the Texas/Louisiana area, a number of names to interview once you were down there, correct?

A. Correct.

Q. And you went down there attempting to track down and talk to all of these individuals; isn't that right?

A. Yes, I did.

Q. But wasn't it difficult to locate some of these individuals?

A. It was.

Q. Why was that?

A. Well, you know, it's a very kind of transient social area, and some people had moved. Some people just didn't have addresses out in the middle of nowhere. We had difficulty tracking them. And we would attempt to obtain information from some other people who we had interviewed as to the whereabouts of these others. We spent a lot of time running people down.

Q. Mr. Brogna, isn't it true that the more you investigated this case in the Texas/Louisiana area, the worse the state of your case became?

A. Yes, that's what happened. The information we obtained was not beneficial, let's put it that way, to posturing a defense.

Q. Mr. Brogna, after Mr. Lambright was convicted at trial, a presentence report was written relating to this case, correct?

A. Yes.

Q. I would like to show you what's been I believe admitted as Respondents' Exhibit 85. This is the presentence report in

OPPOSITION BRIEF

75

(2)

No. 07-452

FILED
NOV 1 0 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

DORA B. SCHRIRO, Director,
Arizona Department of Corrections,

Petitioner,

v.

JOE LEONARD LAMBRIGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JON M. SANDS
Federal Public Defender
DALE A. BAICH*
JENNIFER Y. GARCIA
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR THE
DISTRICT OF ARIZONA
850 West Adams Street
Suite 201
Phoenix, Arizona 85007
(602) 382-2816

* *Counsel of Record* *Counsel for Respondent*

212677

CP

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

In this pre-AEDPA capital appeal, the court of appeals remanded this case for an evidentiary hearing on Lambright's claim pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel was ineffective at sentencing. Following the hearing, the district court denied Lambright's claim. On appeal from that decision, the court concluded that many of the district court's factual findings were clearly erroneous and that Lambright had received ineffective assistance of counsel at sentencing. Although the court briefly discussed the causal nexus standard applied by the district court, that portion of the opinion is unrelated and irrelevant to the holding that Lambright was entitled to relief under *Strickland*.

1. Whether the court of appeals properly applied the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), when it concluded that Lambright's trial counsel provided ineffective assistance at sentencing by failing to investigate and present readily-available evidence in mitigation of Lambright's crime.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Petition	4
1. This Court should deny the petition for certiorari in this case because the grant of relief to Lambright was based entirely upon the ineffectiveness of Lambright's trial counsel at sentencing	4
2. This case is not the appropriate vehicle for reaching the question presented by Petitioners regarding the application of *Tennard* to Arizona's sentencing procedures or addressing any alleged conflict between the Arizona Supreme Court and the Ninth Circuit Court of Appeals	7
3. The court of appeals correctly determined that the district court's factual findings in this case were clearly erroneous and that Lambright was prejudiced by the ineffective assistance of his counsel at sentencing	8

Contents

Page

A. Lambright's trial counsel provided ineffective assistance of counsel at sentencing by failing to investigate and present readily-available evidence in mitigation of Lambright's crime 9

B. Lambright was prejudiced by the deficient performance of his counsel at sentencing 13

4. This Court should disregard Petitioners' irrelevant arguments in the third section of the petition because they were not presented to the courts below and are not even tied to a federal question in the petition itself 15

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Federal Cases

Arizona v. Evans, 514 U.S. 1 (1995) 6

Ashwander v. TVA, 297 U.S. 298 (1936) 6

Delaware v. Van Arsdall, 475 U.S. 673 (1986) .. 6

Lambright v. Schriro, 490 F.3d 1103 (2007) 1

Lambright v. Stewart, 241 F.3d 1201 (2001) 2, 4

Lockhart v. Fretwell, 506 U.S. 363 (1993) 13

Rita v. United States, 127 S. Ct. 2456 (2007) ... 16

Rompilla v. Beard, 545 U.S. 374 (2005) 8, 13

Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 16

Strickland v. Washington, 466 U.S. 668 (1984) ..*passim*

Teague v. Lane, 489 U.S. 288 (1989) 6

Tennard v. Dretke, 542 U.S. 274 (2004) 5, 7

(Terry) Williams v. Taylor, 529 U.S. 362 (2000) 8, 12

Wiggins v. Smith, 539 U.S. 510 (2003) 8, 10, 12

Cited Authorities

Page

United States Constitution

Sixth Amendment 8, 15

Federal Statutes

Anti-Terrorism and Effective Death Penalty Act of 1996 ..... *passim*

Federal Rules

U.S. Ct. R. 10 18

U.S. Ct. R. 14 16

U.S. Ct. R. 14.1 2

U.S. Ct. R. 15.2 1

Respondent, Joe Leonard Lambright, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion by the Ninth Circuit in this case. The opinion is reported at *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007) (per curiam).

STATEMENT OF THE CASE

Lambright respectfully directs this Court to, and adopts herein, the detailed recitation of the underlying facts and procedural history set forth in the opinion below.[1]

In addition to his incorporation of the facts and procedural history from the opinion below, Lambright notes that his federal habeas corpus petition was filed prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and accordingly, the provisions of that act do not apply to him. (Apx. A-20.) Also, following the Ninth Circuit panel opinion in this case, Petitioner filed a petition for panel rehearing and rehearing *en banc*. (Apx. A-2.) The panel unanimously denied the petition for rehearing, and when the full court was advised of the petition for rehearing *en banc*, no judge requested a vote on that petition. (Apx. A-2 through A-3.)

Further, pursuant to Rule of the Supreme Court of the United States ("Supreme Court Rule") 15.2, Lambright presents the following clarifications

1. Petitioners attached as Appendix A to their petition for writ of certiorari a copy of the opinion below. Reference to the opinion below in this brief will be to Appendix A and will noted as "Apx. A-____."

regarding omissions or misstatements in the petition for certiorari. First, the panel's 2001 remand decision was not solely based on proffered evidence of post-traumatic stress disorder ("PTSD") and methamphetamine abuse, as stated by Petitioner (Petition at 5.) As that opinion discussed at length, the remand decision was necessary to determine whether "Lambright was denied effective assistance of counsel at sentencing because of the failure to investigate and present evidence of his psychiatric condition and social history." *Lambright v. Stewart*, 241 F.3d 1201, 1208 (9th Cir. 2001),[2] *cert. denied*, 534 U.S. 1118 (2002). This question was a point of contention at the evidentiary hearing, and the district court itself eventually agreed that the hearing was not limited to evidence regarding PTSD and methamphetamine abuse. (Tr. Nov. 13, 2003 at 70-71, 197-98.)

At the hearing itself, Lambright presented copious evidence regarding his dysfunctional and abusive childhood, his history of drug addiction, and his lengthy psychiatric history. (Apx. A-13 through A-20.) None of this evidence was presented to the sentencing judge by Lambright's trial counsel. (Apx. A-41.) While the details of a specific combat incident Lambright recalled were not supported by the evidence Lambright presented at the hearing (Apx. A-15 through A-16), the other extensive evidence he presented was not affected by this determination. (Apx. A-54 through A-57 (Ferguson, J., concurring).)

---

2. Petitioners did not append this decision to the petition for writ of certiorari. U.S. Ct. R. 14.1(i).

Finally, although Petitioners note that Lambright's trial counsel "was experienced both as a prosecutor and a defense attorney for a number of years prior to representing Lambright" and "prepared thoroughly for trial and sentencing" (Petition at 5), they ignore the fact that counsel only met with "Lambright once for a little over an hour" prior to sentencing. (Apx. A-5.) Also missing from Petitioners' recitation of the facts is that trial counsel spent less than an hour reviewing the pre-sentence report and speaking with the probation officer (Apx. A-5), took three hours to draft a two and a half page sentencing memo (Apx. A-5), and presented mitigating evidence – related solely to Lambright's conduct in jail awaiting trial – that consumed less than three pages of double-spaced transcript. (Apx. A-33.) Although trial counsel was aware of Lambright's "long history of mental health problems, his two suicide attempts, and his resultant hospitalization in a psychiatric facility" (Apx. A-6), trial counsel did not request Lambright's medical records, failed to discuss these matters with Lambright's sister and friends, and did not seek a psychological or psychiatric evaluation of Lambright. (Apx. A-31 through A-38.) It is against this backdrop that the petition for writ of certiorari should be viewed.

REASONS FOR DENYING THE PETITION

1. This Court should deny the petition for certiorari in this case because the grant of relief to Lambright was based entirely upon the ineffectiveness of Lambright's trial counsel at sentencing.

This case is about ineffective assistance of counsel in a capital sentencing proceeding. In 2001, the court of appeals remanded this case for an evidentiary hearing on that specific question, *see Lambright*, 241 F.3d at 1208, and the district court's conclusion that Lambright was not entitled to relief on that ground was the sole issue before the Ninth Circuit in the opinion below. (*See* Apx. A-25 through A-54.) After the remand in this pre-AEDPA, fact-driven capital case, Lambright received relief in the court of appeals because contrary to the erroneous conclusions of the district court, his trial counsel failed to properly investigate and present readily-available mitigation evidence during the capital sentencing proceedings, and because Lambright was prejudiced by that failure. Despite Petitioners' strenuous attempt to refocus this case on irrelevant questions,[3] any discussion by the court of appeals regarding improper application of a causal nexus standard to the evidence presented below is unrelated to the relief granted and should not be grounds for a grant of certiorari.

---

3. It is telling that despite the bulk of the decision below being focused on Lambright's ineffective assistance of counsel claim, the petition for certiorari here spends approximately four of its thirty pages discussing the appropriateness of that conclusion. (Petition at 16-19.)

Although the court below did discuss the improper causal nexus standard applied by the district court in a short section near the beginning of the opinion (Apx. A-21 through A-25), that portion of the opinion is spatially distinct and analytically independent from the section concluding that Lambright's trial counsel performed deficiently and that Lambright was prejudiced by counsel's failures at sentencing. (Apx. A-25 through A-54.) Aside from that initial discussion, neither *Tennard v. Dretke*, 542 U.S. 274 (2004), nor the causal nexus standard is ever mentioned in any other section of the opinion, including the thirty pages[4] in which the court determines that Lambright's counsel was ineffective. In fact, the opinion's conclusion, again in a section distinct from any other discussion, makes clear that the causal nexus discussion played no part in the decision to grant relief on the ineffectiveness claim. It reads:

> The district court erred in concluding that Lambright did not receive ineffective assistance of counsel at the penalty phase of his trial and further erred in holding that, even if he did, he suffered no prejudice as a result. The sentence imposed is vacated. Further sentencing by the state court shall be conducted in conformance with applicable law.

(Apx. A-54.) It is clear from the four corners of the opinion that the court did not rely on its discussion of the causal nexus standard in granting relief to

---

4. The opinion's pages are counted as formatted in Petitioners' Appendix A.

Lambright. Further, there is no indication whatsoever in the opinion that the court even contemplated that relief might be available on those grounds.

Because the panel's freestanding analysis of the ineffective assistance of counsel issue is the exclusive basis for the grant of habeas relief, the causal nexus issue is not an appropriate ground for a petition for certiorari. *Arizona v. Evans*, 514 U.S. 1, 33 (1995) (Ginsburg, J., dissenting) (highlighting the principle that this Court will avoid constitutional questions when there is an alternative basis for a decision); *Ashwander v. TVA*, 297 U.S. 298, 346-47 (1936) (Brandeis, J., concurring) (stating that "[t]he Court will not pass upon a [federal] constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"); *see also Delaware v. Van Arsdall*, 475 U.S. 673, 692-93 (1986) (Stevens, J., dissenting) (citing Justice Brandeis's concurrence in *Ashwander* as "one of the most respected opinions ever written by a Member of this Court"). Because the court ruled solely based on the ineffectiveness of Lambright's counsel, even if this Court were to grant certiorari on this causal nexus question and grant relief to Petitioners, this decision would have no effect on the relief Lambright received on his ineffectiveness claim, making the issue further inappropriate for a grant of certiorari.[5] Petitioners' contention that certiorari should be granted to address an issue irrelevant to the relief granted by the panel is without merit.

---

5. In addition, the fact that Lambright was granted relief based on *Strickland v. Washington*, 466 U.S. 668 (1984), and not *Tennard* removes any consideration of *Teague v. Lane*, 489 U.S. 288, 311 (1989), from this case. (Petition at 14.)

2. This case is not the appropriate vehicle for reaching the question presented by Petitioners regarding the application of *Tennard* to Arizona's sentencing procedures or addressing any alleged conflict between the Arizona Supreme Court and the Ninth Circuit Court of Appeals.

Despite Petitioners' arguments to the contrary, this case is simply not the appropriate vehicle for determining, as Petitioners urge, whether the Arizona courts correctly apply a causal nexus test to evidence presented in mitigation of a capital crime, or whether the Arizona Supreme Court and the Ninth Circuit are in conflict over application of a causal nexus test. Even assuming that this Court might be inclined to address the merits of this claim, this case, which has a complex and convoluted procedural history and factual record and is distinguishable from the state court cases cited by Petitioners, is not a case in which certiorari should be granted.

Here, the causal nexus issue arose for the first time in the federal district court during habeas corpus proceedings. The district court judge presided over an evidentiary hearing and improperly substituted his own judgment regarding the evidence for that of a reasonable juror in a state capital sentencing proceeding, also improperly limiting his consideration of such evidence to that causally connected to the crime. The Arizona Supreme Court has not been fairly presented with the issue in this case, which did even not arise in state court, and that court has not been given the opportunity to address *Tennard* in this case. This is not a case in which a jury was prevented from considering evidence in

presented in a capital sentencing proceeding, and thus is entirely distinguishable from the Arizona Supreme Court's causal nexus jurisprudence in that regard.

3. The court of appeals correctly determined that the district court's factual findings in this case were clearly erroneous and that Lambright was prejudiced by the ineffective assistance of his counsel at sentencing.

As noted above, the petition for federal habeas corpus relief in this case was filed prior to the enactment of the AEDPA, and accordingly, its provisions do not apply.

This Court's Sixth Amendment jurisprudence regarding ineffective assistance of counsel in capital cases is extensive and provides a clear guide for lower courts in determining whether counsel performed deficiently and whether a defendant was prejudiced by that deficiency. *See, e.g., Strickland v. Washington*, 466 U.S. 668 (1984). The analytic process set forth in *Strickland* has been repeatedly reviewed and affirmed by this Court. *See Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (O'Connor, J., concurring) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*. . . ."); *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003) (reiterating that *Strickland* is the metric by which to judge claims of ineffective assistance of counsel); *(Terry) Williams v. Taylor*, 529 U.S. 362, 391-95 (2000) (discussing the *Strickland* analysis in detail). The court of appeals was properly guided by the Sixth Amendment, *Strickland*,

and this Court's subsequent cases in granting relief to Lambright and nothing about the court's decision below merits examination by this Court.

A. Lambright's trial counsel provided ineffective assistance of counsel at sentencing by failing to investigate and present readily-available evidence in mitigation of Lambright's crime.

The performance by Lambright's trial counsel did not even approach the standards set by *Strickland* and its progeny for counsel in a capital sentencing proceeding, and Petitioners do not make a serious attempt in the few pages of the petition addressing this issue to prove otherwise. Aside from a few unsupported assertions regarding trial counsel's efforts, Petitioners instead take issue with the specific language used by the court in finding that the district court erred in denying relief. None of these complaints have any merit.

First, Petitioners incorrectly contend that the court of appeals paid "only lip service" to the clearly erroneous standard of review, when in fact the opinion below illustrates the lack of evidence supporting the district court's order, resulting in the clearly erroneous findings. (Petition at 17.) In fact, the example provided by Petitioners is a perfect illustration of Lambright's argument and the panel's correct determination that the district court erred in denying this claim. Petitioners argue that Lambright's trial counsel "undertook a significant mitigation investigation prior to sentencing." (Petition at 18.) As the panel correctly determined, there is simply no evidence to support this assertion and any conclusion otherwise is improper. Lambright's counsel

did not reasonably investigate Lambright's background, making any decisions about what evidence to present impossible. *See Wiggins*, 539 U.S. at 536 (noting that "counsel [was] not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable").

As discussed at length in the opinion, Lambright's trial counsel did travel on one occasion to Texas with counsel for the co-defendant, and "spoke with a number of potential witnesses prior to the guilt phase of Lambright's trial,"

> [I]t is unclear whether any of the individuals [trial counsel] spoke with during this trip were people he viewed as potential penalty phase witnesses. When [trial counsel] spoke to Lambright's sister, he primarily asked her about Lambright's conduct around the time of the crime and does not appear to have asked her about Lambright's upbringing, his mental health, or other potential mitigating evidence.

(Apx. A-32.) Trial counsel himself testified at the evidentiary hearing that his interview with Lambright's sister, the only member of Lambright's family that he contacted, was focused on events shortly before and after the crime; he never asked her about Lambright's history of drug abuse, his abusive and unstable childhood, his mental health history (including his psychiatric hospitalization), his hospitalization after attempting suicide, or his changed and abnormal behavior after returning from Vietnam. (Tr. Nov. 20, 2003 at 756, 760-62, 765.)

Aside from this trip, which was not focused on mitigation investigation and development, trial counsel did almost nothing to prepare for the sentencing hearing. Although trial counsel was aware that Lambright had a history of mental health problems, had attempted suicide at least twice and was hospitalized in a psychiatric facility, counsel "did not discuss these issues with Lambright's friends or family members, nor did he request Lambright's medical or hospital records." (Apx A-31.) In addition, even though trial counsel knew that Lambright discussed his traumatic experiences in Vietnam with the probation officer and a court-appointed psychologist, "he did not attempt to obtain any information about these experiences or their effect on [Lambright]." (Apx. A-31.) Finally, even though counsel knew that Lambright suffered from antisocial personality disorder, trial counsel "did not contact the psychologist to discuss this diagnosis, nor did he attempt to have another psychologist or psychiatrist evaluate Lambright. He likewise failed to hire an independent investigator, despite his awareness that the court would pay for these additional expenses." (Apx. A-31.)

Trial counsel was also aware of Lambright's severe drug addiction, but "conducted no investigation with regard to the extent of [Lambright's] drug use or its effect on his general mental state or behavior." (Apx. A-31.) Counsel never requested any of Lambright's school or military records (Apx. A-31), and never even attempted to interview either of Lambright's ex-wives. (Apx. A-32.) At the sentencing hearing itself, counsel presented almost no evidence on Lambright's behalf, and what he did present "was minimal and markedly uncompelling." (Apx. A-33.) As the court below noted,

"[t]he sum total of the mitigating evidence that [trial counsel] offered at sentencing required less than three pages of a double-spaced transcript and relates only to Lambright's behavior in jail." (Apx. A-33.) These failures clearly establish trial counsel's failure to effectively represent Lambright at sentencing. *See, e.g., Wiggins*, 539 U.S. at 524 (finding ineffective assistance when counsel "abandoned [his] investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources").

Finally, Petitioners argue that Lambright's trial counsel "properly relied on information gathered by the probation department and on a report from the court-appointed mental health expert." (Petition at 18.) Petitioners cannot have their cake and eat it, too; either trial counsel conducted a "significant" investigation, or he relied on others to investigate and present the information for him. In any event, there is no basis for Petitioners' assertion that it was "proper" for counsel to rely on two court-appointed individuals, neither of whom was a member of the defense team or had any obligations to Lambright, to investigate and present evidence in mitigation of Lambright's crime. In fact, such an assertion flies directly in the face of this Court's jurisprudence regarding counsel's obligations in a capital sentencing proceeding. *See, e.g., Strickland*, 466 U.S. at 691; *(Terry) Williams*, 529 U.S. at 396. As the court of appeals correctly concluded, trial counsel's "representation falls far below that which any reasonably competent attorney would provide in a capital case," satisfying the deficient performance prong of *Strickland*. (Apx. A-37 through A-38.)

B. Lambright was prejudiced by the deficient performance of his counsel at sentencing.

A sentencing proceeding infected by constitutionally deficient investigation and presentation of mitigation establishes prejudice because the reviewing court cannot have "confidence in the outcome" of such a proceeding. *Strickland*, 466 U.S. at 669. This Court has emphasized that the prejudice analysis does not depend on whether the outcome of the proceeding would have been different. "[T]he [outcome-determinative] standard is not quite appropriate." *Strickland*, 466 U.S. at 694. Rather, Lambright must show "a probability sufficient to undermine confidence in the outcome" of the proceeding. *Id.* "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v. Fretwell*, 506 U.S. 363, 369 (1993). This Court has consistently held that trial counsel's failure to present readily available evidence of mitigation is sufficient to undermine confidence in the result of a sentencing proceeding, thereby rendering counsel's performance prejudicial. *Rompilla*, 545 U.S. at 390-91.

Here, counsel failed to investigate and present evidence of childhood abuse, drug and alcohol addiction, and mental illness. Because there was only one aggravating factor to mitigate in this case, it was even more imperative that the sentencing court have access to all available mitigation evidence, witnesses, and experts.[6] Trial counsel denied the sentencing court the

6. In Arizona, once one aggravating circumstance was found, if no mitigating evidence is presented, a death sentence is virtually assured.

ability to adequately assess and weigh Lambright's life and situation against the single aggravating circumstance, thus counsel's deficient performance rendered the penalty phase and its outcome unreliable.

Lambright presented the district court with ample evidence that he suffered a traumatic and abusive childhood. None of this evidence was presented to the court at sentencing. Lambright was subjected to "constant emotional and physical abuse by his mother throughout his childhood." (Apx. A-42.) As the court below correctly noted, "testimony could have been offered to show that his mother frequently hit, kicked, or whipped him, and that these beatings were a daily occurrence during extended periods of his childhood."

Lambright also suffered from long-term drug abuse and dependency, which the district court concluded was properly presented to the sentencing judge. (Apx. B-40.) However, as the court of appeals correctly found, this finding is clearly erroneous because the sentencing court heard nothing about the "rampant" drug and alcohol abuse in Lambright's family and by Lambright himself (Apx. A-44), or about "the negative impact drug abuse had on his ability to form relationships." (Apx. A-45.) In addition, trial counsel "could have provided expert testimony about the long-term psychological impact on [Lambright] of his extreme methamphetamine abuse. At the evidentiary hearing, even [Petitioners'] expert, Dr. Lang, diagnosed Lambright with profound substance dependency." (Apx. A-45.)

Finally, Lambright suffered from long-term bouts with mental illness, including major personality changes, depression, multiple suicide attempts and hospitalization in a psychiatric facility in the years before the crime in this case occurred. (Apx. A-45 through A-48.) "Dr. Morenz, Lambright's mental health expert, testified that Lambright has experienced varying levels of depression for most of his life and at times has suffered from "major depression." Even Dr. Lang, [Petitioners'] expert, diagnosed him with a depressive disorder." (Apx. A-46.)

None of this evidence was properly presented to the court at sentencing, undermining confidence in the result. The court below relied on this Court's well-established *Strickland* and Sixth Amendment standards in reaching this result, and as discussed herein and at length in the opinion below, it is supported by both the facts and the law. Nothing about the relief granted here should compel this Court to grant certiorari.

4. This Court should disregard Petitioners' irrelevant arguments in the third section of the petition because they were not presented to the courts below and are not even tied to a federal question in the petition itself.

Finally, Petitioners spend nearly a third of the petition for certiorari outlining their disdain for Lambright's mitigation presentation, their general dissatisfaction with the Ninth Circuit, and their disagreement with recent decisions by that court. (Petition at 19-28.) As an initial matter, these arguments were not raised in the courts below and are not fairly included in the questions before this Court as allowed

by this Court's rules, and as such, are not appropriately raised here for the first time. U.S. Ct. R. 14 (requiring a petitioner to show that a federal question was timely and properly raised in the proceedings below); *see also Rita v. United States*, 127 S. Ct. 2456, 2470 (2007) (declining to consider an issue not raised below); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (finding an issue waived when not raised below).

In addition, Petitioners' dramatic discussion of the alleged combat incident is irrelevant to the ultimate constitutional question of whether Lambright received ineffective assistance of counsel at sentencing. Also, their contention that a diagnosis of PTSD cannot be supported without such an incident is both unrealistic and disrespectful to military veterans who served this country in capacities other than engaging in direct combat. The concurrence to the per curiam opinion below summarizes this point:

> War is hell. Not only for the soldier who fights on the front lines, but also for the military ambulance driver who must rescue the wounded, the mess hall cook whose friends are killed on the battlefield, the civilian who loses a loved one, and the augmentee who, like Lambright, runs patrol missions at an Air Force base in a war-plagued country. Any member of the military exposed to trauma may suffer from PTSD, regardless of whether he or she served on the front lines or exchanged gunfire with the "enemy."
>
> . . . .

> There is no question that Lambright came home from Vietnam a changed man. His first wife testified that before his deployment to Vietnam, Lambright "was a kind person, gentle, free-hearted," but that he returned troubled and disturbed. Lambright "wasn't like the same person. . . . [H]e didn't have a calm nature about him. . . . [H]e wasn't a happy person." He had difficulty sleeping and suffered from frequent combat nightmares, including one incident in which he grabbed his wife and told her to get down because the Viet Cong was hiding in the bushes. Lambright often wished himself dead, and on one occasion he drove his car into a tree in an attempt to kill himself.
>
> Lambright's sister also observed a significant change after Lambright returned from Vietnam. She stated, "[B]efore he went to Vietnam[,] Joe was kind, gentle, and well-behaved. When he got back from his service in Vietnam he was completely changed. He was extremely tense, paranoid, and nervous." She once discovered him on her porch, "cowering against a wall [and] swinging a butcher knife," and hallucinating about an "imaginary attack by someone or something."

(Apx. A-54 through A-57.) As the court of appeals correctly discerned, the absence of a combat incident during Lambright's service in Vietnam is not dispositive of whether he is properly diagnosed with PTSD.

Further, Petitioners do not raise a federal question in this third section or tie their arguments to any of the grounds discussed in Supreme Court Rule 10 regarding this Court's considerations governing review on certiorari. Petitioners do not link this third part of the petition to one of the two constitutional questions presented, but instead focus on an attempt to win the Court's sympathy for their arguments regarding the Ninth Circuit's purported attempt to "thwart[] the interests of justice." (Petition at 19.) This is inappropriate and further illustrates Petitioners' repeated attempts to shift the focus of this case away from the factually and legally-supported holding below that Lambright's trial counsel was ineffective at sentencing.

CONCLUSION

For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
DALE A. BAICH*
JENNIFER Y. GARCIA
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR THE
DISTRICT OF ARIZONA
850 West Adams Street
Suite 201
Phoenix, Arizona 85007
(602) 382-2816

Counsel for Respondent

* *Counsel of Record*

REPLY BRIEF

77

(3)

No. 07-452

FILED
DEC 11 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

VS.

JOE LEONARD LAMBRIGHT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

PATRICIA NIGRO
Assistant Attorney General
(Attorney of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Az. 85007–2997
(602) 542–4686

CAPITAL CASE

QUESTIONS PRESENTED

In 2001, the Ninth Circuit ordered an evidentiary hearing to address Lambright's claim of ineffective assistance of counsel at sentencing, noting in particular allegations that counsel failed to pursue evidence that Lambright suffered from post-traumatic stress disorder based on combat experiences in Vietnam, as well as other evidence Lambright asserted would have changed the sentencing decision. After conducting a 6-day evidentiary hearing, the district court denied Lambright's claim, finding that his alleged combat experiences were fabricated, and that his other factual assertions were not proven or related to evidence that was presented at the time of sentencing. The Ninth Circuit reversed, finding that the district court improperly considered the "causal nexus" between the proffered mitigation and the crime in weighing the value of the purported mitigation and determining whether it would have changed the outcome of Lambright's sentencing proceeding.

1. Did the Ninth Circuit err when it held that *Tennard v. Dretke*, 542 U.S. 274 (2004), requires not merely that mitigating evidence with no causal connection to the crime be *considered* at a capital sentencing hearing, but also that a court may not take the absence of a causal connection into account when assessing whether the failure of counsel to present that evidence was prejudicial?

2. Did the Ninth Circuit err by failing to give proper deference to the district court's factual findings and credibility assessments regarding Lambright's proffered mitigation and regarding the persuasiveness of Lambright's argument that the proffered mitigation

would have changed the outcome of the sentencing proceeding?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES ii

OPINION BELOW .....

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE GRANTED 1

CONCLUSION 6

TABLE OF AUTHORITIES

Cases — Page

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985). 4

Lambright v. Schriro, 490 F.3d 1103 (9th Cir. 2007) 2

Smith v. Texas, 543 U.S. 37 (2004), ... 2, 6

State v. Hampton, 213 Ariz. 167, 140 P.3d 950 (2006) 3

State v. Newell, 212 Ariz. 389, 132 P.3d 833 (2006) .. 3

State v. Pandeli, 215 Ariz. 514, 161 P.3d 557 (2007). 3

Tennard v. Dretke, 542 U.S. 274 (2004) ..... i, 1, 2, 3, 6

United States v. Yellow Cab Co., 338 U.S. 338 (1949) 4

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 4

Rules

Federal Rule of Civil Procedure 52(a) 5

STATEMENT OF THE CASE

Petitioners rely on the Statement of the Case set forth in the Petition for Writ of Certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Ninth Circuit's misapplication of *Tennard v. Dretke* is essential to its analysis of Lambright's *Strickland* claim of ineffective assistance of counsel.

Lambright incorrectly argues that the Ninth Circuit's erroneous *Tennard* analysis was "unrelated and irrelevant" to its holding that Lambright was entitled to relief under *Strickland*. (Brief in Opposition at i.) The *Tennard* analysis is in fact essential to the Ninth Circuit's determination of the prejudice prong of the *Strickland* inquiry.

Contrary to Lambright's assertion that the *Tennard* analysis was merely an aside, the Ninth Circuit made clear that its reading of *Tennard* was outcome determinative:

> *At the outset, we reject the district court's analysis with respect to deficient performance and prejudice because it is predicated on the application of a legal test that is clearly inapplicable.* The district court disregarded virtually all of the mitigating evidence that Lambright presented at the evidentiary hearing on the basis that it had no "explanatory nexus" to the crime. In so doing, it

misapplied controlling Supreme Court and Ninth Circuit precedent.

Lambright v. Schriro, 490 F.3d 1103, 1114 (9th Cir. 2007) (Pet. App. A, at 21 (emphasis added)). The Ninth Circuit went on to find, based on its interpretation of *Tennard*, *Smith v. Texas*, 543 U.S. 37 (2004), and Ninth Circuit precedent, that the district court's analysis of Lambright's ineffective assistance claim was "fundamentally flawed." (Pet. App. A, at 25, 490 F.3d at 1115.)

Thus, Lambright's assertion that the *Tennard* issue is unrelated to the Ninth Circuit's *Strickland* holding should be summarily rejected.

II. There is a clear conflict between the Ninth Circuit and the Arizona Supreme Court in their application of *Tennard*.

Lambright argues that because "[t]his is not a case in which a jury was prevented from considering evidence in [sic] presented in a capital sentencing proceeding," (Brief in Opposition at 8-9), it is distinguishable from the Arizona Supreme Court's causal nexus jurisprudence and is thus an inappropriate vehicle for this Court to use to reconcile the conflict between Ninth Circuit and Arizona law.

However, neither the Arizona cases nor this case involve a situation where the sentencer was prevented from *considering* evidence. Instead, both this case and the Arizona cases involve evidence that was considered, but given little or no weight because of the absence of a causal nexus. The Ninth Circuit holds that such an analysis violates *Tennard*, while the

Arizona Supreme Court has held that such an analysis is proper. *See State v. Newell*, 212 Ariz. 389, 405, ¶ 82, 132 P.3d 833, 849 (2006) ("We do not require that a nexus between the mitigating factors and the crime be established before we consider the mitigation evidence. [citing *Tennard*]. But the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.") *See also State v. Pandeli*, 215 Ariz. 514, 532, ¶ 72, 161 P.3d 557, 575 (2007) (in exercising its independent review of Pandeli's death sentence, the Arizona Supreme Court found that Pandeli's "difficult childhood and extensive sexual abuse, while compelling," were not causally connected to the murder he committed in his late twenties, and thus his mitigating evidence was not entitled to significant weight); *State v. Hampton*, 213 Ariz. 167, 185, ¶ 89, 140 P.3d 950, 968 (2006) (while Hampton's childhood was "horrendous," it was entitled to less mitigating weight on independent review "because he has not tied it to his murderous behavior.")

The issue of the conflict between the Arizona Supreme Court's interpretation of *Tennard* and that of the Ninth Circuit is thus central to the Ninth Circuit's decision, and therefore squarely before the Court in this case.

III. The Ninth Circuit failed to give the district court judge's factual findings the deference they were due.

Lambright's contention that the Ninth Circuit properly rejected the factual findings made by the district court judge ignores this Court's pronouncement that a reviewing court may not reverse simply because

it disagrees with the outcome reached by the lower court. *Anderson v. City of Bessemer City, North Carolina,* 470 U.S. 564, 573 (1985). When applying the "clearly erroneous" standard, an appellate court must keep in mind that their function is not to conduct a de novo factual review. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Moreover, if there are two plausible views of the evidence, the factfinder's choice of one cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). In this case, the Ninth Circuit ignored these principles.

While Lambright points out instances in which the Ninth Circuit disagreed with the district court's determination of the facts, he, like the Ninth Circuit, fails to establish that the Ninth Circuit had the authority to reverse based on those disagreements. Here, the district court, at the Ninth Circuit's direction, held a 6-day evidentiary hearing, considering evidence and determining the credibility of witnesses, including Lambright himself. Lambright, like the Ninth Circuit, has simply provided his own analysis of the facts, as well as his own judgments about witness credibility, ignoring the district court's well-reasoned and well-supported findings of fact. In this case, the Ninth Circuit acted as a trier of fact, not as a reviewing court, when it found, based upon its de novo review of the record, that the district court had wrongly interpreted the record. Such a result flies in the face of the Rules and case law by which the Ninth Circuit is bound.

IV. This Court may properly entertain policy considerations when deciding an important question of federal constitutional law.

Lambright urges this Court to ignore important policy considerations, such as the interests of justice and the State's and victims' interest in the finality of criminal judgments, claiming that such considerations are not properly before this Court. However, this Court may consider whether the Ninth Circuit has thwarted the policy considerations underlying Federal Rule of Civil Procedure 52(a), which requires a reviewing court to defer to factual findings unless those findings are clearly erroneous, and to recognize the unique ability of the trial judge to determine witness credibility. By substituting its own judgment for that of the district court, the Ninth Circuit has ignored the rules that apply to it.

Moreover, Lambright misstates Petitioner's argument regarding his diagnosis of PTSD: Petitioner does not contend that only a direct combat incident may trigger PTSD. Rather, Petitioner contends, as both Lambright and the Ninth Circuit were forced to concede, that Lambright's "combat incident," the basis for his alleged diagnosis of PTSD, was fictitious. Indeed, the concurring opinion of Judge Ferguson, cited by Lambright to support his assertion that Petitioner is "disrespectful to military veterans," (Brief in Opposition at 16-17), perfectly illustrates the Ninth Circuit's willingness to reject the district court's well-reasoned factual findings, based on its analysis of expert testimony and its determination of the credibility of those experts. Rather than an "attempt at sympathy," (Brief in Opposition at 18), Petitioner's discussion of policy directly relates to the question of

whether the Ninth Circuit overstepped its bounds and failed to give appropriate deference to the district court's factual findings and credibility assessments.

The Ninth Circuit's ruling in this case demonstrates a disregard for the fundamental principles underlying federal collateral review. Rather than advancing the interests of justice, the Ninth Circuit's ruling defeats finality and undermines public confidence in the criminal justice system. The Ninth Circuit ordered an evidentiary hearing because of a concern that compelling evidence, such as Lambright's alleged combat experiences, were not presented to the sentencer. Notwithstanding a 6-day evidentiary hearing and express factual findings by the district court rejecting Lambright's blatant lies concerning his fictitious combat experiences, the Ninth Circuit has nevertheless ordered the state to start over with a new sentencing proceeding.

Finally, the Ninth Circuit's ruling in this case has implications far beyond the facts presented here. The Ninth Circuit's *Tennard* analysis will affect every Arizona capital case in which mitigation evidence has been proffered, but given diminished weight based on the absence of a causal nexus to the crime. Given the broad applicability of the Ninth Circuit's decision and its clear conflict with Arizona law, review is imperative.

CONCLUSION

The Ninth Circuit's erroneous expansion of *Tennard* and *Smith v. Texas* directly conflicts with caselaw of the Arizona Supreme Court. Moreover, the Ninth Circuit not only misinterpreted and misapplied this Court's precedent, but failed to accord deference to the

district court's factual findings and determinations of witness credibility. This Court should accept certiorari to resolve the conflict between the Ninth Circuit and the Arizona Supreme Court, and to enforce its holdings regarding the consideration of mitigation evidence by a capital sentencer and the deference that should be accorded factual findings and credibility determinations made by a trier of fact.

Respectfully submitted

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

PATRICIA NIGRO
Assistant Attorney General
(Attorney of Record)
Capital Litigation Section
1275 W. Washington
Phoenix, Arizona 85007–2997
Telephone: (602) 542–4686

74884